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No.

IN THE

Supreme Court of the United States

HERMAN E. MITCHELL,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY, ET AL,
Respondents

On Petition for Writ of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did fraud upon the court occur when two attorneys made a joint decision to intentionally withhold and conceal the "coverage card" and the underwriting file relating to an insurance policy followed by the two attorneys intentionally making false statements in deposition testimony, preparing and submitting false affidavits and preparing and submitting false pleadings and making false statements in open court to conceal the existence of the "coverage card" and underwriting file?

2. Did the Fifth Circuit and the District Court commit error by failing to determine whether or not fraud upon the court had occurred in conflict with two decisions of this United States Supreme Court and in conflict with three decisions of the Fifth Circuit and in conflict with nine decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits.

PARTIES

The Petitioner is Herman E. Mitchell, Plaintiff and Appellant in the underlying action.

The Respondents are Metropolitan Life Insurance Company and Allstate Life Insurance Company, Defendants and Appellees in the underlying action.

CORPORATE DISCLOSURE STATEMENT

Respondents Metropolitan Life Insurance Company and Allstate Life Insurance Company are publically traded companies.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES 2

STATEMENT OF THE CASE 3

A. Proceedings Below 3

B. Key Facts 6

REASONS FOR ALLOWANCE OF THE WRIT 15

I. Review Is Warranted Because this Court Has The "Duty" To Take Corrective Action When Fraud Upon The Court Occurs. *Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944) 15

II. Review Is Warranted Because The Fifth Circuit and the District Court Committed Error by Failing to Determine Whether or Not Fraud upon the Court Had Occurred in Conflict with Two Decisions of this United States Supreme Court and in Conflict with Three Decisions of the Fifth Circuit and in Conflict with Nine Decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits 18

A. Conflict with Two Decisions of this United States Supreme Court 18

B. Conflict with Three Decisions of the Fifth Circuit 20

C. Conflict with Nine Decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits 23

1. Second Circuit 24

2. Fourth Circuit 24

3. Sixth Circuit 25

4. Seventh Circuit 25

5. Eighth Circuit 25

6. Ninth Circuit 25

CONCLUSIONS 28

APPENDIX

June 2, 2005 Denial of Rehearing and En Banc Review by the Fifth Circuit Court of Appeals App.1-2

May 9, 2005 opinion of the Fifth Circuit Court of Appeals App.3-5

February 12, 2003 Memorandum Opinion and Order of U. S. District Judge Paul Brown App.6-21

First March 22, 2004 Memorandum Opinion and Order of U. S. District Judge Paul Brown App.22-27

Second March 22, 2004 Memorandum Opinion and Order of U. S. District Judge Paul Brown App.28-31

March 31, 2004 Order of U. S. District Judge Paul Brown App.32

May 17, 2004 Memorandum Opinion and Order of U. S. District Judge Paul Brown App.33-42

May 17, 2004 Final Judgment of U. S. District Judge Paul Brown App.43

Coverage Card App.44-45

Portions of the Insurance Policy App.46

October 2, 1990 Handwritten Note from Cheryl Oakes To Attorney Paul Huck App.47

September 25, 1990 Letter from Attorney Paul Huck to Attorney James Hodapp App.48

Undated Letter from Attorney Paul Huck to Attorney Carl Chapman App.49-50

September 19, 1989 letter from MG Herring to Allstate App.51-52

November 8, 1990 Second Request for Production to Allstate App.53-55

December 7, 1990 Allstate's Response to Second Request for Production App.56-57

March 21, 1991 Amended Deposition Notice and Subpoena Duces Tecum to Cheryl Oakes App.58-60

March 21, 1991 Amended Deposition Notice and Subpoena Duces Tecum to Allstate App.61-63

September 19, 1991 Metropolitan and Allstate's Response to Mitchell's Motion to Compel Discovery with Attached September 17, 1991 Affidavit of Cheryl Oakes App.64-70

January 27, 1995 Affidavit of Attorney Chapman with Attached September 17, 1991 Affidavit of Cheryl Oakes App.71-75

March 28, 1991 Deposition Excerpts of Cheryl Oakes with Statements of Attorney Paul Huck App.76-77

March 28, 1991 Deposition Excerpts of Allstate Representative with Statements of Attorney Paul Huck App.78

February 10, 2004 Deposition Excerpts of Laura Sullivan App.79-80

January 26, 2004 Deposition Excerpts of Attorney Carl Chapman App.81-84

February 10, 2004 Deposition Excerpts of Attorney Paul Huck App.85-87

March 18, 1991 affidavit of
Dr. Louis A. Shirley, M.D. App.88-90

March 18, 1991 affidavit of
Dr. Kenneth P. Greenfield M.D. App.91-93

March 17, 2004 affidavit of
Herman E. Mitchell App.94-97

April 1, 2005 Letter from Mitchell's Attorney
to the Fifth Circuit Court of Appeals App.98-99

TABLE OF AUTHORITIES

Cases **Page**

Abrahamsen v. Trans State Express Inc., 92 F. 3d 425 (6th Cir. 1996) 16,25,28

Allstate Insurance Company v. Michigan Carpenters' Council Health & Welfare Fund, 760 F. Supp. *665 (W.D. Mich. 1991)* 13,14

Bankers Mortgage Company v. United States, 423 F. 2d 73 (5thCir. 1970) *cert. denied* 90 S. Ct. 2242 14

Browning v. Navaro, 826 F. 2d 335 (5th Cir. 1987) 16,20,23

Green v. Foley, 856 F.2d 660 (4th Cir.1988) 25,28

Hazel Atlas Glass Co. v. Hartford Co., 322 U.S. 238 (1944) iii,15,16,17,18,19,20,27,29

Johnson Waste Materials v. Marshall, 611 F.593 (5thCir.1980) 14,16,21,23

Kupperman. v. Consolidated Research & Manufacturing Corp. 459 F.2d 1072 (2nd Cir. 1972) 24,28

Lonsdorf v. Seefeldt, 47 F.3d 893 (7th Cir. 1995) 25,28

Minneapolis, St. Paul and S.S. Marie Railroad Company v. Moquin, 283 U.S. 520 (1931) 16,17,19,20,22

Mitchell v. Metropolitan Life Ins. Co., 18 F. 3d 937 (5th Cir. 1994) *cert denied* 513 U.S. 815 (1994) 4

Cases **Page**

Herman E. Mitchell v. Allstate Life Insurance Co.,
No. 96-11110, slip op. (5th Cir. 1997) 13

Mitchell v. Chapman., 10 S.W.3d 810
(Tex. Civ. App.– Dallas 2000, *pet denied, reh'g denied*)
cert denied 531 U.S.1152 (2001) 6,13,14

Mitchell v. Metropolitan Life Ins. Co., 130 Fed. Appx. 679
(5th Cir. 2005) 1

H. K Porter Co. Inc. v. Goodyear Tire & Rubber Co.,
536 F.2d 1115 (6th Cir. 1976) 25,28

Pumphrey v. Thompson Tool Co., 62 F.3d 1128 (9th Cir. 1995)
cert denied 516 U.S. 1158 (1996) 16,25,26,27,28

Rozier v. Ford Motor Co., 573 F.2d 1332
(5th Cir.1978) 16,19,21,22,23,24

Schultz v. Butler, 24 F.3d 626 (4th Cir. 1994) 25,28

Square Construction Co. v. Washington, Etc., 657 F.2d 68
(4th Cir. 1981) 16,24,28

United States v. Beggerly, 524 U.S. 38 (1998) 14

United States v. Denham, 817 F.3d 1307 (8th Cir. 1986) 25,28

Rules of Civil Procedure

Fed. R. Civ. P. 59(b) 2

Fed. R. Civ. P. 60 2

Rules of Civil Procedure **Page**

Fed. R. Civ. P. 60(b) 2,3,5,23

Fed. R. Civ. P. 60(b)(2) 21,22,25

Fed. R. Civ. P. 60(b)(3) 21,22,24,25

Fed. R. Civ. P. 60(b)(5) 21

Statutes

28 U.S.C. § 1254(1) (1982) 1,3

28 U.S.C. Section 1332 (2005) 3

29 U.S.C. Section 1132(a)(1)(B) (1974) 4

29 U.S.C. Section 1132(a)(3) (1974) 4

29 U.S.C. Section 1133 (1974) 4

29 U.S.C. Section 1144(b)(2) (1974) 4

OPINIONS BELOW

The June 2, 2005 denial of rehearing and en banc review by the Fifth Circuit Court of Appeals is appended hereto. (App. 1-2)

The May 9, 2005 opinion of the Fifth Circuit Court of Appeals is appended hereto, *Mitchell v. Metropolitan Life Ins. Co.*, 130 Fed. Appx. 679 (5th Cir. 2005). (App. 3-5)

The February 12, 2003 Memorandum Opinion and Order of U. S. District Judge Paul Brown is appended hereto. (App. 6-21)

The first March 22, 2004 Memorandum Opinion and Order of U. S. District Judge Paul Brown is appended hereto. (App. 22-27)

The second March 22, 2004 Memorandum Opinion and Order of U. S. District Judge Paul Brown is appended hereto. (App. 28-31)

The March 31, 2004 Order of U. S. District Judge Paul Brown is appended hereto. (App. 32)

The May 17, 2004 Memorandum Opinion and Order of U. S. District Judge Paul Brown is appended hereto. (App. 33-42). The May 17, 2004 Final Judgment of U. S. District Judge Paul Brown is appended hereto. (App.43)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion affirming the United States District Court judgment on May 9, 2005. A rehearing and en banc review was timely requested and denied on June 2, 2005. No extension of time was requested.

28 U.S.C. § 1254(1) confers jurisdiction upon the Supreme Court of the United States in this matter.

STATUTES

Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. [omitted]

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Jurisdiction was vested in the United States District Court for the Eastern District of Texas pursuant to 28 U.S.C. Section 1332 (diversity jurisdiction) and Federal Rule of Civil Procedure 60(b) (independent action based upon fraud upon the court). The appeal in the Fifth Circuit Court of Appeals was an appeal from a final judgment of the United States District Court in a civil case brought pursuant to Federal Rule of Civil Procedure 60(b). Petitioner (herein "Mitchell") timely filed a notice of appeal with the Fifth Circuit Court of Appeals on June 14, 2004. The Fifth Circuit Court of Appeals had jurisdiction over the appeal from the final judgment in the District Court under 28 U.S.C. Section 1332 (diversity jurisdiction) and Federal Rule of Civil Procedure 60(b)(independent action based upon fraud upon the court). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) (1982) and Federal Rule of Civil Procedure 60(b) (independent action based upon fraud upon the court).

The procedural background of this case is that Petitioner Mitchell's lawsuit was filed on February 1, 2001 in the District Court as an independent action under Federal Rule of Civil Procedure 60(b) because in a prior lawsuit in the Federal District Court the two attorneys representing Respondents Metropolitan Life Insurance Company (herein "Metropolitan") and Allstate Life Insurance Company (herein "Allstate") intentionally made false statements in deposition testimony, prepared and submitted false affidavits and prepared and submitted false pleadings and made false statements in open court to conceal the existence of the "coverage card" and underwriting file relating to the insurance policy that was the subject of that prior suit.

Summary judgment was granted in this case against Mitchell by the District Court on May 9, 2004. Oral argument before the Fifth Circuit Court of Appeals in this case was set for April 7, 2005, which

oral argument was also to be held before the Fifth Circuit Bar Association. On April 1, 2005 counsel for Mitchell was advised by the clerk for the Fifth Circuit Court of Appeals that oral argument had been canceled and that the court would determine the case based upon the briefs. Mitchell's appeal was denied by the Fifth Circuit on May 9, 2005. Mitchell's petition for rehearing and petition en banc were denied on June 2, 2005 by the Fifth Circuit.

The prior suit was originally filed in Texas State District Court on May 11, 1990 by Mitchell and then removed to the United States District Court for the Eastern District of Texas by Respondents (herein the "Prior Sherman Suit"). In the Prior Sherman Suit Mitchell asserted causes of action under: (1) 29 U.S.C. Section 1132(a)(1)(B) to recover benefits under an ERISA plan; (2) 29 U.S.C. Section 1132(a)(3) for Metropolitan's breach of its fiduciary duty in improperly handling Mitchell's claim; (3) 29 U.S.C. Section 1133 for Metropolitan's breach of its duty to provide Mitchell with a "full and fair review" of Mitchell's claim denial; and, (4) Texas state laws that regulate insurance that were not preempted by ERISA pursuant to 29 U.S.C. Section 1144(b)(2) for fraud in the sale of the insurance policy against Respondent Allstate. In the Prior Sherman Suit the lead attorney for Metropolitan and Allstate was Carlyle Chapman (herein "Chapman"). In the Prior Sherman Suit Metropolitan's in house attorney, Paul Huck (herein "Huck") was the attorney in charge of the case to whom Chapman reported. Attorney Huck also appeared *pro hac vice* and appeared in various depositions and also approved all pleadings before they were signed and filed in the Prior Sherman Suit.

The Prior Sherman Suit was decided by the District Court in a bench trial on December 7, 1992 and an opinion was issued on January 6, 1993. That decision was appealed to the Fifth Circuit, which affirmed the District Court on March 3, 1994 and this Supreme Court denied certiorari on October 3, 1994. *Mitchell v. Metropolitan Life Ins. Co.*, 18 F. 3d 937 (5th Cir. 1994) *cert denied* 513 U.S. 815 (1994).

On June 17, 1994 another suit was brought in Texas state court solely against Allstate by Mitchell for fraud in the sale of the insurance policy because the insurance policy did not contain the "presumptive disability provision" and the "own occupation coverage" that Allstate represented in writing that the insurance policy would contain. That suit was removed to United States District Court for the Northern District of Texas by Allstate and summary judgment was granted against Mitchell on April 24, 1995 based upon *res judicata* (herein the "Northern District of Texas Suit"). In the Northern District of Texas Suit the lead attorney for Allstate was Chapman.

In that Northern District of Texas Suit the "coverage card" and the underwriting file were produced after discovery had closed on March 17, 1995 because Mitchell's attorney had a telephone conversation (ordered by the Dallas Federal Magistrate to resolve discovery issues) with an associate attorney from attorney Chapman's law office on or about March 10, 1995. During this telephone conversation the associate attorney (who claimed the Allstate underwriting file did not exist) was requested to look into the file of the Prior Sherman Suit and was told that if he did, he would most probably find files that Chapman had been wrongfully withholding and concealing. It was shortly after this conversation that the coverage card and the underwriting file were produced.

The April 24, 2004 decision in the Northern District of Texas Suit that was based upon *res judicata* was appealed to the Fifth Circuit, which affirmed the District Court on March 14, 1997 based upon *res judicata* holding that the wrongs in the Sherman court could not be challenged in the Dallas federal court. The Fifth Circuit was very specific in holding that Mitchell could seek this independent action (by bringing "an independent action in the Eastern District of Texas....to set aside that judgment"). However, based upon applicable law concerning independent actions brought under rule 60(b) of the Federal Rules of Civil Procedure Mitchell could not proceed with this independentaction until Mitchell had exhausted all of Mitchell's other remedies.

On February 27, 1997, fifteen days before the Fifth Circuit's March 14, 1997 ruling in the Northern District of Texas Suit, a suit was filed by Mitchell against attorney Chapman, in Texas State District Court, alleging among other things fraud, civil conspiracy, and misrepresentations based upon Chapman's actions in the two prior lawsuits (herein the "State Court Chapman Suit"). This independent action could not be sought until that State Court Chapman Suit was concluded.

In the State Court Chapman Suit summary judgment for Chapman was granted by the Texas State District Court on June 12, 1997 and the Texas Appeals Court affirmed the State District Court on January 28, 2000 stating that under Texas state law no cause of action existed against Chapman but added that there was nothing to prevent Mitchell from going back to the Sherman Federal District Court and seeking a bill of review [or an independent action under applicable federal law]. The Texas State Appeals Court also specifically found that **"There is no dispute that plaintiff (Mitchell) needed the document (the presumptive disability provision)[and the "coverage card" verifying "own occupation" coverage] to succeed in his earlier suits."** *See Mitchell v. Chapman, 10 S.W.3d 810,* 811 *(Tex. Civ.* App.- *Dallas 2000, pet denied, reh 'g denied) cert denied 531 U.S. 1152* (2001). This Supreme Court denied certiorari in the State Court Chapman Suit on February 20, 2001.

B. KEY FACTS

On June 20 1989 at age 48, Mitchell filed his application for disability benefits based upon an injury to his eyes caused by mega dosages of niacin that had been prescribed to him by the physician that oversaw company physicals of the top executives of Mitchell's employer. Mitchell was one of the top executives that had a life-insurance policy to which the employer was a beneficiary. The mega dosages of niacin were prescribed to lower Mitchell's cholesterol. The injury to Mitchell's eyes was "niacin maculopathy with nonstaining cystoid macular edema" (permanent scar tissue on the

inside of the eyeballs resulting from the ingestion of niacin). Mitchell was Vice President of Administration and Chief Financial Officer of his employer, an owner and developer of shopping malls across the southwest United States. Mitchell is a Certified Public Accountant with a Master's of Business Administration.

On May 11, 1990 Mitchell brought the Prior Sherman Suit against Metropolitan and Allstate seeking damages that are now in excess of $2,066,950.92. In two March 28, 1991 depositions attorney Huck, an attorney representing Allstate and Metropolitan and the in-house attorney for Metropolitan that was ultimately in charge of the case, falsely stated on two deposition records that all of the documents contained in the underwriting file (including the "coverage card") were previously produced to Mitchell. (Petitioner's Appendix at 76 and 78) (herein "App."). Attorney Huck stated **"Let me make one quick one as to be subpoena duces tecum. The defendants have already produced the entire claim file, it's my understanding also the entire underwriting file relating to the policy in this action...."**(App. 76). Attorney Huck also stated **"..All records of Allstate concerning this policy have been produced through Metropolitan, i.e., the Allstate underwriting file, which as part of the sale of Allstate Group Insurance assets has now become the property of Metropolitan...."**(App. 78)

In this action in a February 10, 2004 deposition attorney Huck admitted that his March 28, 1991 statements in the record of the depositions were not true. (App. 87) **"[Question]: In fact this was not true; was it? [Answer] No it was not."** (App. 87)

In the Prior Sherman Suit Mitchell subsequently filed a motion to compel production of the underwriting file (which also included the "coverage card") and Metropolitan and Allstate responded on September 19, 1991 with a false response signed by Metropolitan and Allstate's lead attorney Chapman relying on a sworn affidavit that attorney Chapman also prepared falsely stating that the underwriting file had been searched for and could not be found. (App. 64-65.) Metropolitan and Allstate's response

specifically stated:

> **COME NOW Metropolitan...and Allstate...Plaintiff has sought from Defendants an 'underwriting file' which Plaintiff alleges that should be in existence regarding the aforementioned group insurance policy. Although Defendant Allstate has responded that after a diligent search, the requested file cannot be located, Plaintiff continues to take the position that there must be an underwriting file...Plaintiff therefore, continues to harass Defendants to produce that which it cannot....**"(App. 64-65)

In this action attorneys Huck and Chapman admitted in their 2004 depositions that they read and approved all pleadings and affidavits before they were signed and filed in the Prior Sherman Suit, including the September 19, 1991 response to motion to compel and attached affidavit. (App. 81 and 87)

In the Prior Sherman Suit after Mitchell's motion to compel was denied, Mitchell located a copy of one of the documents that was in the underwriting file, a proposal for the insurance policy that was ultimately issued. Trial was held in the Prior Sherman Suit on December 7, 1992 and Mitchell attempted to offer the proposal for the insurance policy into evidence and offer testimony from the insurance agent concerning the proposal, however Mitchell was not allowed to elicit testimony concerning the proposal and the proposal was not allowed into evidence because Metropolitan and Allstate's lead attorney, Chapman, objected and falsely represented in open court that the proposal had not been in Metropolitan and Allstate's files and therefore pursuant to ERISA could not be introduced into evidence. (App. 83-84)

In this action Chapman subsequently stated in his January 26, 2004 deposition that the underwriting file that contained the proposal and the "coverage card" were not only in Metropolitan and Allstate's files but probably actually in Chapman's possession in the Sherman courtroom during the original trial of the Prior Sherman Suit on

December 7, 1992. (App. 84)

Mitchell's position in the Prior Sherman Suit was that the insurance policy provided "own occupation" coverage to Mitchell and that there was supposed to be a "presumptive disability" provision that presumed Mitchell to be disabled if Mitchell's income decreased by 50% or more.

In this action, as verified by affidavits from Mitchell and two of Mitchell's treating physicians at all times material herein Mitchell was disabled from his "own occupation" (App. 90, 93 and 96). As verified by affidavits from Mitchell and Mitchell's federal income tax returns at all times material herein Mitchell was disabled based upon the application of the presumptive disability provision because at no time after Mitchell's claim was filed was Mitchell's income more than 50% of what it was before Mitchell's claim was filed. (App. 94-96).

Because in the Prior Sherman Suit Metropolitan and Allstate's attorneys wrongfully withheld and concealed the underwriting file and the "coverage card" and ERISA controlled, Mitchell was unable to offer any written documentation from Metropolitan and Allstate's files verifying the "own occupation" coverage and the "presumptive disability" provision.

In the Prior Sherman Suit Metropolitan and Allstate's interpretation of the contract language deemed Mitchell not disabled if Mitchell could do one of Mitchell's job duties but Mitchell could not do the other nine of Mitchell's job duties. This interpretation was upheld by the District Court as not being an abuse of discretion by Metropolitan and Allstate because under ERISA the only evidence that the District Court could consider were the documents that Metropolitan and Allstate stated were in their files. However, the "coverage card" of the insurance policy and underwriting file of the insurance policy were concealed and were not considered by the District Court in the Prior Sherman Suit even though those documents should have been considered *de novo* by the District

Court because they both went to the interpretation of ERISA plan provisions.

On June 17, 1994, Mitchell brought a second action solely against Allstate in Texas state court that was removed by Allstate to Federal District Court in Dallas, Texas based upon fraud in the sale of the insurance policy, because the policy that was bargained for was to include "own occupation coverage and the "presumptive disability" provision (herein the "Northern District of Texas Suit"). Attorney Chapman represented Allstate in that suit and filed a motion for summary judgment on November 29, 1994 falsely alleging that the insurance agent had prepared the Allstate proposal that contained references to "own occupation coverage and the "presumptive disability" provision and falsely alleging that Allstate had no knowledge of the "presumptive disability" provision or the "own occupation coverage.

Certain discovery was done in the Northern District of Texas Suit during early 1995 and Mitchell filed another motion to compel and attorney Chapman signed an affidavit on January 27, 1995 again falsely reiterating that the underwriting file (and the "coverage card") did not exist. (App. 71-75) Chapman supplemented Allstate's discovery answers after discovery had closed on March 17, 1995 and produced the "coverage card" and the underwriting file for the insurance policy in question in the Northern District of Texas Suit. (App. 44-45)

In this action in a February 10, 2004 deposition Metropolitan employee and expert witness Laura Sullivan testified that one of the documents that was in the underwriting file was the two-page "coverage card" that contained the coverage conveyed by the insurance policy in the Prior Sherman Suit and in this action. (App. 79 and 44-45). In particular Ms. Sullivan testified as follows:

"[Question] Do you have an understanding as to what this document is?

[Answer] Yes.

[Question] What is it?

[Answer] **This is a page from a coverage card that was used with Allstate.**

[Question] **And what is a coverage card?**

[Answer] **A coverage card is a document that was completed by the underwriters which identified provisions of a specific group disability plan or other group disability coverage."**(App. 79 and 44-45)

In this action in a February 10, 2004 deposition Ms. Sullivan also testified that this "coverage card" conveyed "own occupation coverage" and included a "presumptive disability" provision. (App. 79 and 44-45) In particular Ms. Sullivan testified as follows:

"[Question] The page 69 that's on S[illegible]ivan exhibit 8 that has the policy number at the top 64402935. **It has the definition of presumptive disability. Was it your earlier testimony that this page, page 69, was actually part of the coverage card for that policy?**

[Answer] **Yes.** (App. 79 and 45)

[Question] Looking at page 60, which I believe you have testified is the coverage card, **would it be fair to assume that the coverage granted by the Herring Marathon, Inc. policy number 64402935 was own occupation coverage for Class I and II employees?**

[Answer] **Yes."**(App.79 and 44)

In this action in a February 10, 2004 deposition, based upon Ms. Sullivan's answer to a hypothetical question Mitchell's original claim should have not been denied had the "own occupation coverage" and "presumptive disability" provision been applied. (App. 80). In particular Ms. Sullivan testified as follows:

"[Question] **If you had a surgeon who is making a disability claim and he had an injury to his hand and he was governed by an own occupation coverage, and he had this presumptive disability enhancement and surgery–he only did surgery, let's say, one day out of five but he produced 60% of his income from that surgery and he just saw patients on the other**

days.

If his income-he had an injury to his hand that he could not do the surgery, but he still could carry on his office practice the other four days of the week, but his income was reduced by 60% and he had the provision-this presumptive disability provision on page 69, would that be a time where you would hypothetically apply the presumptive disability enhancement benefit and award him-award his claim?...

[The Witness]

What was his loss of earnings that you indicated please?

[Mr. Mitchell Question]

60%. Let's say he was making $200,000 a year and now he was only able to make $80,000 a year, because $120,000 of it was from surgery. Because of the injury to his hand he could not do the surgery anymore?

[Answer] **If that individual was in fact working in some capacity and his earnings loss was a result of that injury, the presumptive disability provision would be applied; and if in fact his ability to earn or his earnings actually were less than 50% of his predisability earnings, then that work activity would not cause him to be deemed not disabled."**

(App. 80 and 44-45).

In the Northern District of Texas Suit Chapman only produced the underwriting file and the "coverage card" after Mitchell's attorney had a telephone conversation (ordered by the Dallas Federal Magistrate to resolve discovery issues) with an associate attorney in Chapman's law office on or about March 10, 1995. During this telephone conversation the associate attorney (who claimed the Allstate underwriting file did not exist) was requested to look into the file of the original Prior Sherman Suit and was told that if he did, he would most probably find files that attorney Chapman

had been wrongfully withholding and concealing. Once the expression in the associate attorney's voice changed (after the associate attorney looked in the file of nonproduced documents from the original Prior Sherman Suit) Mitchell's undersigned attorney told the associate attorney that he knew the associate attorney had seen documents that had been wrongfully concealed and that what attorney Chapman was doing was wrong. The associate attorney was told that he should not put his law license on the line for attorney Chapman's wrongful actions. The "coverage card" and the underwriting file were then produced on March 20, 1995.

On April 24, 1995 in the Northern District of Texas Suit the Dallas federal district court granted Allstate's motion for summary judgment that had been filed on November 29, 1994, without considering the new evidence that Chapman produced on March 20, 1995. That case was appealed to the Fifth Circuit on November 14, 1996, and it was ruled on March 14, 1997 based upon *res judicata* that the wrongs in the Sherman court in the Prior Sherman Suit could not be challenged in the Dallas federal court. The Fifth Circuit was very specific in holding that Mitchell could seek this independent action (by bringing "an independent action in the Eastern District of Texas....to set aside that judgment"). *Herman E. Mitchell v. Allstate Life Insurance Co.*, No. 96-11110, slip op. at 1, 9 (5th Cir. 1997). However, Mitchell could not proceed with this independent action until Mitchell had exhausted all of Mitchell's other remedies.

A suit was filed by Mitchell against Chapman just 15 days before on February 27, 1997 in the 160th Texas State District Court, alleging among other things fraud, civil conspiracy, and misrepresentations based upon attorney Chapman's actions in the two prior lawsuits. This independent action could not be sought until that case was concluded.[1] Summary judgment for Chapman was granted

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[1] *See Mitchell v. Chapman*, 10 S.W.3d 810 (Tex. Civ. App.-Dallas 2000, *pet denied, reh 'g denied) cert denied* 531 U.S. 1152 (2001). *See Allstate Insurance Company v. Michigan*

by the state trial court and on January 28, 2000 the Texas state appeals court affirmed the trial court stating that no cause of action existed against Chapman but added that there was nothing to prevent Mitchell from going back to the Sherman Federal District Court and seeking a bill of review [or an independent action under applicable federal law]. The Texas State Appeals Court also specifically found that **"There is no dispute that plaintiff (Mitchell) needed the document (the presumptive disability provision)[and the "coverage card" verifying "own occupation" coverage] to succeed in his earlier suits."**[2]

This suit was brought on February 1, 2001. The District Court denied Metropolitan and Allstate's second motion to dismiss on February 12, 2003 and held that there remained two fact issues to decide concerning Mitchell's first motion for summary judgment: (1) whether the information was intentionally withheld; and,(2) whether the presumptive disability provision ever became part of the plan. (App. 21) Discovery was conducted on these two fact issues and depositions of two of the attorneys involved and Metropolitan's in-house expert were conducted in January and February of 2004. At these depositions both attorneys admitted the decision to withhold the files was a **joint decision** that both attorneys made. (App. 81-83 and 87) (**"[Answer]... It would certainly be a decision we were both comfortable** with...."). (App. 87)

Carpenters' Council Health & Welfare Fund, 760 F. Supp. 665 (W.D. Mich. 1991). *See also United States v. Beggerly*, 524 U.S. 38 (1998); *Johnson Waste Materials v. Marshall*, 611 F.593 (5th Cir.1980); *Bankers Mortgage Company v. United States*, 423 F. 2d 73 (5th Cir. 1970) *cert. denied* 90 S. Ct. 2242.

[2] *See Mitchell v. Chapman*, 10 S.W.3d 810, 811 (Tex. Civ. App.- Dallas 2000, *pet denied, reh 'g denied) cert denied* 531 U.S. 1152 (2001).

Based upon 2004 depositions and documents produced soon after March 22, 2004 it was confirmed that back in 1990 attorney Huck was provided with the underwriting file and the "coverage card" by Cheryl Oakes, the ERISA plan administrator, on October 2, 1990. (App. 85-87 and 47) **"Per your request please find the underwriting file on Herring Marathon Group Inc."** (App. 47)

Based upon 2004 depositions and documents produced soon after March 22, 2004, it was confirmed that back in November of 1990 attorney Huck instructed attorney Chapman not to produce the underwriting file and the "coverage card". (App. 82, 85, 87 and 49-50) **"...Also enclosed are the original group underwriting files that should not be produced at this time...."**(App. 49-50)

In this case oral argument before the Fifth Circuit Court of Appeals was set for April 7, 2005 which oral argument was also to be held before the Fifth Circuit Bar Association. On April 1, 2005 counsel for Mitchell was advised by the clerk for the Fifth Circuit Court of Appeals that oral argument had been canceled and that the court would determine the case based upon the briefs.(App. 98-99)

Mitchell's appeal was denied by the Fifth Circuit on May 9, 2005 and petitions for rehearing and en banc review were denied on June 2, 2005.

REASONS FOR ALLOWANCE OF THE WRIT

I. Review Is Warranted Because this Court Has The "Duty" To Take Corrective Action When Fraud Upon The Court Occurs. *Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944).

Fraud upon the court occurred when two attorneys made a joint decision to intentionally withhold and conceal the "coverage card" and the underwriting file relating to an insurance policy. (App. 82, 85, 87 and 49-50) The two attorneys intentionally made false statements in deposition testimony, prepared and submitted false

affidavits and prepared and submitted false pleadings and made false statements in open court to conceal the existence of the "coverage card" and underwriting file. (App. 56-57, 64-70, 71-75, 76, 78, 81-84, and 85-87)

What do you do when an attorney commits fraud in the actual presentation of the case to the court? In 1944 in *Hazel Atlas* this U.S. Supreme Court held that courts have not only the power but the **"duty"** to take corrective action when **fraud upon the court occurs.** *Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944).

Attorneys from day one of law school are governed by the honor code. That is later codified into the rules of procedure, evidence and ethical rules of professional responsibility under which all attorneys practice law. Judges generally accept as true the written and oral representations of attorneys because the attorneys are officers of the court and it is their duty to be truthful with the court.

Once fraud upon the court occurs, the court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the court may rely on such conduct alone to set aside the judgment and the court in fact has a **"duty"** to take corrective action when **fraud upon the court occurs.**[3] From the attorneys viewpoint the rule should always be "If **you** lie, **you lose**".

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[3]*Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944); *Minneapolis, St. Paul and S.S. Marie Railroad Company v. Moquin*, 283 U.S. 520, 521-22 (1931); *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995) *cert denied* 516 U.S. 1158 (1996); *Abrahamsen v. Trans State Express Inc.*, 92 F. 3d 425 (6th Cir. 1996); *Square Construction Co. v. Washington, Etc.*, 657 F.2d 68 (4th Cir. 1981); *Browning v. Navaro*, 826 F. 2d 335, 344 (5th Cir. 1987); *See Johnson Waste Materials v. Marshall*, 611 F.2d 593, 597-598 (5th Cir.1980); and, *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir.1978).

The Fifth Circuit wholly ignored the issue of fraud upon the court and effectively sent the message to two of the largest insurance companies in the U. S. that they can commit fraud upon the court without consequence. This issue is of great concern to the judicial system as a whole because if these two large insurers are allowed to get away with committing fraud upon the court it will have a trickling down effect through all subsequent claims through those companies and other lawsuits of others throughout the country. The entire integrity of the judicial system will be compromised.

The Fifth Circuit's decision to make no determination as to whether or not there was fraud upon the court violates the **"duty"** imposed upon Courts by this U. S. Supreme Court in *Hazel Atlas* and further violates the rule of law set forth by this U. S. Supreme Court in *Minneapolis, St. Paul and S.S. Marie Railroad. Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944); *Minneapolis, St. Paul and S.S. Marie Railroad Company v. Moquin*, 283 U.S. 520, 521-22 (1931).

If the Fifth Circuit's decision stands it will be not only an invitation but a specific instruction to commit fraud upon the court, because even if you get caught there are no consequences for your actions. Too frequently the following occurs. A party does not produce documents that are detrimental to his case. A motion to compel is filed. A hearing is held. The end result is that counsel for the compelled party falsely states that "we just don't have the documents". The Judge says "I can't force them to produce what they say they don't have". That is what happened in this case. There must be a remedy. There must be consequences. If **you** lie, **you lose.** This Court has the **"duty"** to take corrective action when **fraud upon the court occurs** and therefore this Court should grant review. *Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944).

II. Review Is Warranted Because The Fifth Circuit and the District Court Committed Error by Failing to Determine Whether or Not Fraud upon the Court Had Occurred in Conflict with Two Decisions of this United States Supreme Court and in Conflict with Three Decisions of the Fifth Circuit and in Conflict with Nine Decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits.

The Fifth Circuit and the District Court committed error by failing to determine whether or not fraud upon the court had occurred in conflict with two decisions of this United States Supreme Court and in conflict with three decisions of the Fifth Circuit and in conflict with nine decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits.

A. Conflict with Two Decisions of this United States Supreme Court

This U.S. Supreme Court has held that courts have the **"duty"** to take corrective action when **fraud upon the court occurs**. *Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944). This U.S. Supreme Court reasoned that fraud by an officer of the court struck to the center of the administration of justice itself.[4]

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[4]In particular this U.S. Supreme Court in *Hazel Atlas* provided:

> **Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public**

As earlier stated by this U. S. Supreme Court, **"a litigant who has engaged in misconduct is not entitled to the benefit of calculation which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent"**[5].

The Fifth Circuit's decision to make no determination as to whether or not there was fraud upon the court violates the "duty" imposed upon Courts by this U. S. Supreme Court in *Hazel Atlas* and further violates the rule of law set forth by this U. S. Supreme Court in *Minneapolis, St. Paul and S.S. Marie Railroad.* Violating that rule is exactly what the Fifth Circuit did. The Fifth Circuit allowed Metropolitan and Allstate to speculate as to whether or not the wrong would have affected Mitchell's claim[6].

> **justice not be so impotent that they must always be mute and helpless victims of deception and fraud.** (Emphasis added).
>
> *Hazel Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

[5]*Minneapolis, St. Paul and S.S. Marie Railroad Company v. Moquin*, 283 U.S. 520, 521-22 (1931), *cited by Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir.1978). *See Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 250 (1944).

[6]In actuality the speculation was wrong because the Fifth Circuit's May 9, 2005 finding that Mitchell "retired" in 1989 at age 48 is totally not supported by the record. Neither the record nor Metropolitan and Allstate's argument made any reference to "retirement" at age 48, or for that matter "retirement" at all, and the record is clear that since the disability claim was filed in 1989 Mitchell has either been employed or gainfully seeking employment as reflected by his income tax returns and affidavits which are in the record. (App. 96) Likewise, the District Court's speculation that the presumptive disability provision would have only applied during a 10-day period from June 20, 1989 through June 30, 1989 was contrary to a *de novo*

The rule of law concerning fraud upon the court enumerated by this U. S. Supreme Court is that once the determination is made that officers of the court have corruptly abused the judicial process, the court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the court may rely on such conduct alone to set aside the judgment. *Browning v. Navaro,* 826 F. 2d 335, 344 (5" Cir. 1987) (discussing *Hazel Atlas*). Thus the Fifth Circuit's decision is in direct conflict with *Hazel Atlas Glass Co. v. Hartford Co.,* 322 U.S. 238, 250 (1944) and *Minneapolis, St. Paul and S.S. Marie Railroad Company v. Moquin,* 283 U.S. 520, 521-22 (1931) and therefore this Court should grant review.

B. Conflict with Three Decisions of the Fifth Circuit

The Fifth Circuit's decision is in direct conflict with the *Browning v. Navaro,* 826 F. 2d 335, 344 (5th Cir. 1987) decision that held:

> Indeed, *Hazel Atlas* might be read to suggest that once the determination is made that officers of the court have corruptly abused the judicial process, **the court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the court may rely on such conduct alone to set aside the judgment.** *Id* at 344.

Mitchell also pled, briefed and presented summary judgment

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review of the contract which clearly provided that "**The end of insurance will not affect any claim made for a disability which began while the insurance was in force.**" (App. 46) Likewise, the District Court's speculation about what Mitchell may or may not have told the MetLife plan administrator was contrary to a *de novo* review of the contract which clearly provided that "**Allstate cannot use a statement by an employee to deny a claim, unless the statement is in a written application signed by the employee**" (App. 46)

evidence supporting relief under Rules 60(b)(2) [newly discovered evidence], Rule 60(b)(3) [intrinsic or extrinsic fraud of the opposing party], and Rule 60(b)(5) [it is no longer equitable that the judgment be enforced] in line with the Fifth Circuit's 1978 *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir.1978) opinion and the Fifth Circuit's 1980 *Johnson Waste Materials v. Marshall*, 611 F. 2d 593 (5th Cir.1980) opinion, however the Fifth Circuit failed to even address these three other requests for relief under rules 60(b)(2), Rule 60(b)(3) and Rule 60(b)(5).

The Fifth Circuit decision is in direct conflict with the *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir.1978) decision.[7] The

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[7]which decision specifically provided:

> We are left with the firm conviction that disclosure of the Trend Cost Estimate **would "have made a difference in the way plaintiff's counsel approached the case or prepared for trial"**, (citations omitted) *Rozier* 573 F.2d at 1342.
>
> Our system of civil litigation cannot function if parties in violation of court orders, suppress information called for upon discovery. Mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other party to disgorge whatever facts he has in his possession'. *Rozier* 573 F.2d at 1345.
>
> **Through its misconduct in this case, Ford completely sabotaged the federal trial machinery, precluding the 'fair contest' which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle to ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a hypothetical situation imposed by Ford's selective disclosure of information. The policy protecting the finality of judgment is not so broad as to require protection of judgments obtained in this manner** (emphasis added).....[I]t cannot be said with certainty that all of this would have changed the result of the case. **But, as**

Rozier Trend Cost Estimate and the "coverage card" and the underwriting file in Mitchell's case are analogous. The proper and timely disclosure of the "coverage card" and the underwriting file would have definitely changed the way Mitchell approached and conducted the original trial and made a difference in the way Mitchell's counsel approached the case, or prepared for trial. Also *Rozier* confirms **that "a litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent"** *Rozier 573* F.2d at 1346.[8]

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said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent'(emphasis added). *Minneapolis, St. Paul and S.S. Marie Railroad Company v. Moquin, 283 U.S.* 520, 521-22, 75 L.Ed.1243, 51 S. Ct. 501 (1931).*Rozier* 573 F.2d at 1346.

[8]*Rozier* also specifically provides

One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence.(citations omitted). The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense. (citations omitted). Although Rule 60(b)(3) applies to misconduct in withholding information called for by discovery, (citations omitted) **it does not require that the information withheld be of such nature as to alter the result of the case. (citations omitted) This subsection of the rule is aimed at judgments which were unfairly obtained not at those which are factually incorrect.**[Rule 60(b)(2)].

Rozier v. Ford Motor Co., 573 F.2d 1332, 1339 (5th Cir.1978)

Finally, the Fifth Circuit's decision is in direct conflict with the *Johnson Waste Materials v. Marshall, 611* F.2d *593, 597-598 (5th* Cir.1980) decision.[9] Once the elements to bring an independent action are met, the applicable law from motions filed under Rule 60(b) may be used as the applicable law as to whether or not an independent action is meritorious for fraud of the adverse party and/or newly discovered evidence.[10]

Thus the Fifth Circuit's decision is in direct conflict with *Browning v. Navaro,* 826 F. 2d 335, 344 (5th Cir. 1987); *Johnson Waste Materials v. Marshall,* 611 F.2d 593, 597-598 (5th Cir.1980); and, *Rozier v. Ford Motor Co.,573* F.2d 1332 (5th Cir.1978) and therefore this Court should grant review.

C. Conflict with Nine Decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits

The Fifth Circuit's decision is in direct conflict with nine decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits. The Fifth Circuit's failure to address the fraud upon the

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[9]which decision specifically provided:

> In analyzing the 60(b) aspect, *we recognize that Rule 60(b) is to be construed liberally to do substantial justice* [citations omitted]. **The rule is broadly phrased and many of the itemized grounds are overlapping, freeing Courts to do justice in hard cases where the circumstances generally measure up to one or more of the itemized grounds.** (emphasis added by bolding by Mitchell) (citations omitted). *Id.*

[10]*See Johnson Waste Materials v. Marshall,* 611 F.2d 593, 597-598 (5th Cir.1980). *See also Rozier v. Ford Motor Co.,* 573 F.2d 1332 (5th Cir.1978).

court issue is in direct conflict with 9 decisions of the Second, Fourth, Sixth, Seventh, Eighth and Ninth Circuits.

1. Second Circuit:

The Fifth Circuit's decision is in direct conflict with *Kupperman. v. Consolidated Research & Manufacturing Corp.* 459 F.2d 1072, 1078 (2nd Cir. 1972) (While an attorney should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof demands integrity and honest dealing with the court. And when he departs from that standard in conduct of a case he perpetrates a fraud upon the court).

2. Fourth Circuit.

The Fifth Circuit's decision is in direct conflict with a Fourth Circuit case that followed the Fifth Circuit's *Rozier* case, *Square Construction Co. v. Washington, Etc.*, 657 F.2d 68 (4th Cir.1981). In *Square Construction* relief by motion was granted under Rule 60(b)(3) for misconduct of the adverse party in withholding a document, a cost estimate. *Square Construction* is especially on point with Mitchell's case because the district court was not the original fact finder. In *Square Construction* the fact finder was the Corps of Engineers Board of Contract Appeals (the "Board ") and the district court reviewed the Board's decision, just as in the original Prior Sherman Suit the District Court only reviewed the determination of the ERISA plan administrator, which was the original fact finder. The Fourth Circuit provided:

> Setting aside a judgment under FRCP 60(b)(3) does not require that the material withheld be sufficient to alter the district court's judgment, **and we think this is more especially true when the district court is not the initial fact finder, as here.** *Rozier* supra, at 1339. (Emphasis added). *Square Construction Co.*, 657 F.2d at 72 .

The Fifth Circuit's decision is in direct conflict with other

Fourth Circuit cases vacating orders for misconduct under FRCP 60(b)(3): *Schultz v. Butler*, 24 F.3d 626 (4th Cir. 1994) (order vacated based on failure to provide an incident report under FRCP 60(b)(3));and, *Green v. Foley*, 856 F.2d 660 (4th Cir.1988) (order vacated based on misrepresentation in pleadings under FRCP 60(b)(3)).

3. Sixth Circuit.

The Fifth Circuit's decision is in direct conflict with *Abrahamsen v. Trans State Express Inc.*, 92 F. 3d 425 (6th Cir. 1996). In 1996 the Sixth Circuit granted a Rule 60(b)(2) and 60(b)(3) motion to set aside a judgment based on fraud. Since it was the trial attorney (at the instruction of the defendant's insurance company) that committed the egregious conduct a verdict was rendered based upon the misconduct of the attorney. *Abrahamsen v. Trans State Express Inc.*, 92 F. 3d 425 (6th Cir. 1996). *See also H. K Porter Co. Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) (Since attorneys are officers of the court, their conduct, if dishonest would constitute fraud on the court).

4. Seventh Circuit.

The Fifth Circuit's decision is in direct conflict with *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995) (order reversed based on altered evidence under FRCP 60(b)(3)).

5. Eighth Circuit.

The Fifth Circuit's decision is in direct conflict with *United States v. Denham*, 817 F.3d 1307 (8th Cir. 1986) (order reversed based on fraud of the attorney in reading into the record of the court that was deemed misconduct under FRCP 60(b)(3)).

6. Ninth Circuit.

The Fifth Circuit's decision is in direct conflict with *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128(9th Cir. 1995) *cert*

denied 516 U.S. 1158 (1996). In 1995 the Ninth Circuit granted an independent action based upon fraud upon the court and set aside the original judgment in favor of a handgun manufacturer on facts similar to the facts in this case. *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128(9th Cir. 1995) *cert denied* 516 U.S. 1158 (1996).

In 1995 the Ninth Circuit granted an independent action based upon fraud upon the court and set aside the original judgment in favor of a handgun manufacturer that held the decedent eighty percent contributoraly negligent. *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128(9th Cir. 1995) *cert denied* 516 U.S. 1158 (1996). In *Pumphrey* the lawsuit was a products liability case based upon plaintiff's allegation that decedent had the safety engaged on the handgun and that the handgun was dropped and hit the floor and that the handgun discharged with the safety engaged, thereby killing the decedent.

At trial Thompson's expert testified that tests conducted by the expert conclusively showed that the gun would not fire if dropped with the safety engaged. A videotape was introduced at trial backing up these assertions. Previously interrogatory answers were likewise filed stating that Thompson was unaware of any instances in which the handgun had fired when dropped with the safety engaged. Thompson's in house attorney was present throughout the trial, and had physically prepared the interrogatory answers and was present while the expert tested the handgun and was in actual physical possession of the videotape that was shown at trial. Based on the foregoing Thompson avoided eighty percent of the damages based upon contributory negligence.

The independent action arose because sometime later Thompson was involved in another similar lawsuit defending an assertion that the handgun had fired when dropped with the safety engaged. At a settlement conference with the United States Magistrate Judge it was disclosed that in fact a second videotape had been made on the same day as the videotape used in the *Pumphrey* trial which showed that the handgun did fire when dropped with the safety engaged. The Magistrate Judge reported to the District Judge

and Pumphrey's attorney was subsequently notified and filed the independent action to set aside the original judgment based upon fraud upon the court.

As it turned out Thompson had made two videotapes. During the filming of the "original video", the gun fired when dropped with the safety engaged. During the filming of the "trial" video", the gun did not fire when dropped with the safety engaged. The "trial video" was made because the test shown in the "original video" did not turn out as planned. Both the expert and Thompson's attorney were present at both tests and at all material times Thompson's attorney had physical possession of both videos, but did not disclose this fact to trial counsel for Thompson. Thompson's attorney attended the trial and was present when the expert falsely testified several times at trial that the expert had never seen a Thompson handgun fire when dropped with the safety engaged.

The Ninth Circuit found that there was fraud upon the court, relying upon *Hazel Atlas* and provided:

> These undisputed facts reveal that Thompson, through Bartlett (the in house attorney), engaged in a scheme to defraud the jury, the court, the Sparks (plaintiff), through the use of misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impression created by French's (the expert) testimony. The end result of the scheme was to undermine the judicial process, which amounts to fraud upon the court. citing *Hazel Atlas Glass Co. v. Hartford Co.*, 322 U.S. 238, 245-246 (1944). *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1132 (9th Cir. 1995) *cert denied* 516 U.S. 1158 (1996).

The Ninth Circuit went on to recite and to apply the policy reasons originally set forth in *Hazel Atlas* to explain why courts are under an obligation to take action to deter fraud upon the court. In particular the Ninth Circuit provided:

> By failing to disclose the original video, mischaracterizing the results of the drop-tests, and failing to correct the false impression created by French's (the expert) testimony, Bartlett (the attorney) undermined the judicial process. As the District Court noted, Bartlett, as a licensed attorney, 'is aware of the necessity for compliance with the rules of discovery and the rules of professional responsibility. He is aware of the damage failure to abide by these rules can wreck in the specific case at hand and in the larger framework and confidence in the adversary trial system'. *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1995) *cert denied* 516 U.S. 1158 (1996).

Thus the Fifth Circuit's decision is in direct conflict with *Kupperman. v. Consolidated Research & Manufacturing Corp.* 459 F.2d 1072, 1078 (2nd Cir. 1972); *Square Construction Co. v. Washington, Etc.*, 657 F.2d 68 (4th Cir.1981); *Schultz v. Butler*, 24 F.3d 626 (4th Cir. 1994);*Green v. Foley*, 856 F.2d 660 (4th Cir.1988); *Abrahamsen v. Trans State Express Inc.*, 92 F. 3d 425 (6th Cir. 1996); *H. K Porter Co. Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976); *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995); *United States v. Denham*, 817 F.3d 1307 (8th Cir. 1986); *Pumphrey v. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1995) *cert denied* 516 U.S. 1158 (1996), and therefore this Court should grant review.

CONCLUSIONS

The issues presented by this case are of paramount importance to the United States legal system, as attorneys are officers of the court and are not supposed to intentionally make false statements in deposition testimony, prepare and submit false affidavits and prepare and submit false pleadings and make false statements in open court to conceal the existence of documents that are damaging to their case. To allow attorneys to commit fraud upon the court without any consequences "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot

complacently be tolerated consistently with good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice not be so impotent that they must always be mute and helpless victims of deception and fraud". *Hazel Atlas Co. v. Hartford Co.*, 322 U.S. 238, 246 (1944).

Respectfully Submitted By:

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-40756

U.S. Court of Appeals
FILED
JUN 2, 2005
Charles R. Fulbridge, III
Clerk

HERMAN E MITCHELL

Plaintiff - Appellant v.

METROPOLITAN LIFE INSURANCE CO;
ALLSTATE LIFE INSURANCE CO, Northbrook, Illinois

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Sherman

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ON PETITION FOR REHEARING AND REHEARING EN BANC
(Opinion 5/9/05, 5 Cir.,___,___F.3d___)

Before REAVLEY, JONES and GARZA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5m CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. A[PP]. P. and 5TH CIR. R. 35) the Petition for

Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/THOMAS M. REAVLEY
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULE 41 FOR STAY OF THE MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court
of Appeals Fifth Circuit

No. 04-40756

FILED
May 9, 2005
Charles R. Fulbruge III
Clerk

HERMAN E. MITCHELL,

Plaintiff-Appellant,

versus

METROPOLITAN LIFE INSURANCE CO.;
ALLSTATE LIFE INSURANCE CO.,
Northbrook Illinois,

Defendants-Appellees.

Appeal from the United States District Court for
the Eastern District of Texas
(USDC No. 4:01-CV-30-PNB)

Before REAVLEY, JONES and GARZA, Circuit Judges.

PER CURIAM:

We affirm the opinion of the district court for the following reasons:

1. The district court properly entered summary judgment in

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

defendants' favor. The record as a whole establishes that no genuine issue of material fact exists supporting this independent action for fraud on the court. *See Capital Concepts Props. 85-1 v. Mut. First, Inc., 35* F.3d 170, 174 (5th Cir. 1994); *Browning v. Navarro,* 826 F.2d 335, 345 (5th Cir. 1987). The evidence shows that Mitchell's employment was terminated when he retired as a result of the buy-out of Herring Marathon Group, Inc., and not "by reason of sickness or accident." He was therefore ineligible to receive benefits under the presumptive disability provision he alleges defendants wrongfully withheld in the underlying action. Mitchell's affidavit alleging otherwise cannot alone defeat summary judgment, and he presents no other evidence showing that his loss of vision caused his retirement. *Galindo v. Precision Am. Corp.,* 754 F.2d 1212, 1216 (5th Cir. 1985).

Mitchell presents no evidence supporting his allegation that "own occupation disability" under the plan meant that the claimant, due to sickness or injury, could not perform *any* material job duty. On the contrary, the record shows that "own occupation disability" was defined as the inability of the claimant to perform *each* material duty of *his* job (as opposed to *any* job), due to sickness or injury, and that defendants used this definition in considering Mitchell's claim.

Thus, the evidence shows that neither the presumptive disability provision nor the definition of own occupation disability that Mitchell alleges were wrongfully withheld in the underlying action could have supported his claim for benefits in that action. Consequently, Mitchell has not presented a triable issue that defendants' actions foreclosed to him the opportunity to have a fair and complete trial or rendered the trial so fundamentally unfair as to undermine our confidence that the judgment was sound. *Browning,* 826 F.2d at 345. Summary judgment in favor of defendants was therefore appropriate.

2. The district court acted within its discretion in denying Mitchell's motion for a continuance. *See. HC Gun & Knife Shows, Inc. v. City of Houston,* 201 F.3d 544, 549 (5th Cir. 2000). Mitchell sought the continuance to depose attorneys Huck and Chapman regarding their decision not to produce the underwriting file. Because the district court correctly found that Mitchell could not establish

fraud on the court because defendants' withholding of the file had not foreclosed to him the opportunity to fully and fairly litigate the underlying action, further inquiry into Huck's and Chapman's reasons for not producing the file would have been pointless.

3. The district court acted within its discretion in permitting defendants to file an answer after the scheduling deadline had passed. *See S&W Enters. v. Southwest Bank of Ala.*, 315 F.3d 533, 535 (5th Cir. 2003). The court correctly applied the *S&W* factors. *See id.* at 535-36.

4. We decline Mitchell's invitation to review documents provided to the district court for *in camera* inspection and "make *a de novo* determination as to whether or not any additional documents should have been produced." Mitchell claims that the documents establish a scheme to defraud the district court in the underlying action by withholding the underwriting file. The existence of such a scheme is no longer relevant in light of our conclusion that the withholding of the file, for whatever reason, did not diminish Mitchell's ability to fully and fairly litigate the underlying action.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED - CLERK
US DISTRICT COURT
03 FEB 12 AM 9:01
TEXAS -EASTERN
BY s/Tanya McEwen

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
	§	
v.	§	
	§	4:01CV30
METROPOLITAN LIFE	§	
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are Defendants' Motion to Dismiss Plaintiffs Original Complaint for Independent Action [Doc. 29] and Plaintiffs Motion for Summary Judgment and Brief in Support Thereof [Doc. 43]. Having considered the motions, the responses, replies, sur-reply, and the summary judgment evidence, the Court finds that both motions should be denied.

BACKGROUND

This case has a long procedural history that must be reviewed before addressing the merits of the motions. To begin, Plaintiff first brought suit against Defendants in this Court in May 1990, in the case styled *Herman E. Mitchell v. Metropolitan Life Insurance Company and Allstate Life Insurance Company,* (4:90CV124) (the "underlying lawsuit"), to recover long term disability ("LTD") benefits under an employee benefit plan governed by the Employee Retirement Income Security Act of *1974, as amended, 29* U.S.C. *§ 1001,* et seq. ("ERISA"). The LTD benefits were part of a group insurance policy issued by Allstate Life Insurance Company ("Allstate") to Herring Marathon Group, Inc. ("Herring"), Plaintiffs

employer. Metropolitan Life Insurance Company ("MetLife") administered the Plan and after the benefit plan was issued by Allstate, but before Plaintiffs claim was made in June 1989, Allstate transferred the benefit plan to MetLife. Plaintiff alleges that ERISA provided Plaintiff: a cause of action under 29 U. S.C. §1132(a)(1)(B) to recover benefits under the ERISA plan; a cause of action under § 1132(a)(3) for MetLife's alleged breach of fiduciary duty in handling Plaintiffs claim; a cause of action for lack of a "full and fair review;" and causes of action based on state law that regulate insurance that were not preempted by ERISA pursuant to § 1144(b)(2). Plaintiff also alleges that he asserted a claim for fraud in the sale of the insurance policy against Allstate. *See* Plaintiffs Amended Complaint for Independent Action ¶ 8
("Complaint").

During trial, on December 7, 1992, the Court announced that all state claims had been dismissed. The Court dismissed Plaintiffs fraud claim because there was no fact issue presented by the summary judgment evidence and because Plaintiff failed to state a claim upon which relief could be granted under Rule 12(b)(6).[1] More specifically, the Court ruled that Plaintiffs first amended complaint did not state a claim because it "fail[ed] to allege that Plaintiff or his employer relied on Allstate's alleged misrepresentation in purchasing the policy. Furthermore, Plaintiffs fraud claim d[id] not meet the pleading requirement of Rule 9(b)."[2] Accordingly, the Court dismissed these claims and held a trial on Plaintiff's ERISA claims only. On January 6, 1993, after the trial, the Court entered judgment for Defendants.[3] This judgment was upheld by the Fifth Circuit Court of Appeals. *See Mitchell v. Metropolitan Life Ins. Co.*, 18 F.3d 937 (5th Cir. 1994).

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[1] *See* Order on Plaintiffs Motion for New Trial or to Amend Findings and Judgment [Doc. 78] (from the underlying suit); attached to Complaint as Exhibit EE.

[2] *Id.* at 4.

[3] *See* Judgment [Doc. 76] (from the underlying suit); attached to Complaint as Exhibit M.

In May 1994, Plaintiff filed a second lawsuit against Allstate in the United States District Court for the Northern District of Texas (Dallas) alleging that Allstate committed fraud by not including in the group long term disability insurance policy issued by Allstate in the spring of 1988 to Herring a Presumptive Disability Benefit based on a 50% loss of earnings basis.' It was alleged that Allstate had represented in its written proposal furnished to John O'Leary (O'Leary), the independent broker assisting Herring in purchasing its insurance, that this benefit would be included in the policy and that O'Leary had accordingly informed Herring and Mitchell, Herring's Chief Financial Officer and Vice President of Administration who "was in charge of procuring the policy for Herring, that such benefit would be included. *Herman E. Mitchell v. Allstate Life Ins. Co., No.* 96-11110, slip op. at 1,2 (5th Cir. 1997); attached to Complaint as Exhibit N. The district court granted summary judgment on the basis of *res judicata* and limitations. *Id.* The Fifth Circuit affirmed. *Id.*

In 1997, Plaintiff sued Carlyle Chapman ("Chapman"), Defendants' attorney in the underlying lawsuit, in the 160th Texas State District Court, alleging fraud, civil conspiracy, deceit, and negligent misrepresentation. Factually, Plaintiff alleged that Chapman withheld relevant evidence, prepared and submitted false pleadings and affidavits, and fraudulently concealed relevant evidence in the underlying lawsuit. The state court granted Chapman's motion for summary judgment on June 12, 1997. On January 28, 2000 the Dallas court of appeals affirmed the judgment, holding that Plaintiff had no cause of action against Chapman.

Plaintiff has now brought this independent action to set aside this Court's judgment in the underlying lawsuit. Plaintiff contends that the basis of this independent action is the fraud upon the court committed by Chapman in the underlying lawsuit.[4] Plaintiffs main

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[4]Plaintiff also contends that Chapman committed fraud upon the Fifth Circuit Court of Appeals and the Federal District Court for the Northern District of Texas, Dallas Division. *See* Complaint at¶ 17-25. Because this Court is not the proper forum for Plaintiff to complain of alleged frauds committed upon other courts, the Court will not evaluate the merits of these claims. *See Russell v. Sunamerica Securities.*, 962 F.2d 1169, 1176-1177 (5th C. 1992).

contention is that Chapman wrongfully withheld the underwriting file for the insurance policy in the underlying suit. According to Plaintiff, this file contained: (1) the "Allstate Life Insurance Company Group Long Term Disability Proposal Designed Specifically for Herring Marathon" ("Allstate proposal") (which contained the "Special Provisions" presumptive disability provision); (2) three copies of the "Special Provisions" presumptive disability document itself; and (3) a notation on the Allstate proposal that indicated "own occupation" was the coverage offered. The "Special Provisions" presumptive disability document states:

> Definitions - In addition to our standard definition of disability we will also consider an Employee to be totally disabled if by reason of sickness or accident he earns less than 50% of his pre-disability "Basic Monthly Earnings[.]" This definition will apply throughout the Maximum Benefit Duration... .
>
> The above enhancements to our standard contract will control the administration of the noted provisions but will not become an actual part of the contract document.

Complaint at ¶ 48.

In the underling suit, Plaintiff filed a motion to compel production of the underwriting file. Id. at ¶ 36. Plaintiff alleges that Chapman drafted the response to this motion which falsely stated that the file could not be located, and that Chapman drafted the affidavit of the Cheryl Oakes, the Metlife Plan administrator, which also contained, numerous false statements regarding the underwriting file. *Id.* at ¶¶ 36-37. Furthermore, Plaintiff alleges that on September 20, 1991Chapman argued to this Court that: "we (Allstate and MetLife) can't produce what we don't have ... it (the underwriting file) just doesn't exist." *Id.* at ¶¶, 13 and 42. Plaintiff alleges that these representations were false and that during this period the underwriting file was actually in Chapman's office. *Id.* at ¶¶12 and 43. Plaintiff alleges that Cheryl Oakes, then of MetLife, but a former

employee of Allstate, stated in her March 28, 1991 deposition that she had forwarded the underwriting file to her attorney sometime before September 30, 1990. *Id.* at ¶ 38. Plaintiff also alleges that Chapman subsequently admitted that he had physical possession of the underwriting file from at least November of 1990 through March 20, 1995. *Id.* at ¶ 43.

On September 29, 1991, Plaintiff obtained a copy of the Allstate proposal relating to the group insurance policy that was the subject of the underlying disputes from O'Leary. *Id.* at ¶ 25 and 44. On October 10, 1991, Plaintiff filed his response to Defendants' motion for summary judgment and attached this proposal, which contained the presumptive disability provision language, to the response. *Id.* at ¶ 9; *see also* Exhibit Q, pp. 16-17. The pleadings in the underlying suit were closed on April 15, 1991. Plaintiff alleges that on October 10, 1991, Plaintiff "requested that this Court grant Plaintiff leave to amend Plaintiffs pleadings in the Original Action to include the fraud cause of action (based on the omission of the presumptive disability provision)." Complaint at ¶ 8.

Although Plaintiff admits that he obtained a copy of the Allstate proposal more than one year before the original trial, he alleges that he did not obtain the underwriting file for the policy, which contained that presumptive disability document, until March 20, 1995. *Id.* at ¶ 60. Plaintiff alleges that Chapman eventually produced the underwriting file in conjunction with discovery that took place in Plaintiff's second suit in the Federal District Court in Dallas. *Id.* at ¶¶ 58-60. He further alleges that Chapman only produced this file after Plaintiff's attorney spoke with an associate at Chapman's firm and requested that the associate look into the file of this original suit. *Id.*, at ¶61. Plaintiff claims that Chapman intentionally withheld and concealed this file for approximately four and one-half years. *Id.* at ¶ 60.

Plaintiff alleges that he tried to introduce the Allstate proposal at trial on December 7, 1992, but that Chapman objected, stating that the document had not been in MetLife's files and thus it couldn't be considered by the Court. *Id.* at 44. Plaintiff then presumptuously opines on the Court's reasoning for sustaining the objection when he alleges that the Court sustained the objection

based upon Chapman's representation. *Id.* Plaintiff then reasserts that the underwriting file, which contained the Allstate proposal, actually was sitting in Chapman's office at this time. *Id.* at ¶ 46-7.

Finally, Plaintiff alleges that Chapman objected at trial to Plaintiffs attempt to introduce a copy of the insurance policy that was missing three pages. *Id.* at 49. Plaintiff claims that Chapman indicated to the Court that he had a better copy and would obtain the missing pages so that the complete policy could be admitted into evidence. *Id.* Chapman later withdrew his objection and allegedly indicated that he didn't have a better copy and that he didn't believe the missing pages were material. *Id.* Plaintiff intimates that Chapman sanitized the policy by alleging: "Curiously enough the missing pages 12, 22 and 36, would be exactly where one would place a special provision that expanded the definition of disability to include presumptive disability.[5] *Id.*

On March 7, 2002, Plaintiff filed Plaintiffs Amended Complaint for Independent Action. [Doc. 24]. On April 9, 2002, Defendants filed Defendants' Motion to Dismiss Plaintiffs Original Complaint for Independent Action. [Doc. 29]. Defendants move to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6):

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). For a complaint to be dismissed for failure to state a claim, it must appear "beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957); *Reeves v. City of Jackson, Mississippi*, 532 F.2d 491 (5th Cir. 1976). The Court must accept as true all well-pleaded facts contained in Plaintiffs complaint and view them in the light most favorable to the Plaintiff. *Baker v. Putnal*, 75

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[5]The Court does not find this intimation to be effective. As discussed below, to defeat a 12(b)(6) motion, Plaintiff must plead specific facts, not conclusory allegations.

F.3d 190, 196 (5th Cir. 1996). In addition, all reasonable inferences are to be drawn in favor of Plaintiff's claims. *Lowrey,* 117 F.3d at 247. The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is examined in the light most favorable to the Plaintiff and with every doubt resolved in the Plaintiffs favor. *Id.* However, to survive a Rule 12(b)(6) motion, the Plaintiff must plead specific facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace, 954* F.2d 278, 281 (5th Cir. 1992).

DISCUSSION

Plaintiff brings this independent action for fraud upon the court pursuant to Fed. R. Civ. P. 60(b), which states that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order or proceeding, or to ... set aside a judgment for fraud upon the court." The Court initially notes that "the portion of Rule 60(b) that deals with independent actions is expressed in the disjunctive - a court may relieve a party from a judgment *or* set aside a judgment for fraud upon the court. Considerations that bear on one ground may thus not bear on another." *Johnson Waste Materials v. Marshall,* 611 F.2d 593, 600 (5th Cir. 1980). Indeed, distinguished commentators and subsequent precedent have made it clear that these actions are to be treated separately. *See* 12 JAMES WM. MOORS ET AL., MOORES FEDERAL PRACTICE § 60.81 (1)(b)(3d ed. 1997) (Moore's) (distinguishing between an independent action to relieve a party from judgment and the inherent power of the court to set aside a judgment for fraud upon the court); 11 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2851, at 229 (2d ed. 1995) (WRIGHT & MILLER) (same); *United States v. Buck,* 281 F.3d 1336,1341-42 (10th Cir. 2002) (same); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,* 675 F.2d 1349 (4th Cir. 1982) (same). The Court finds it necessary to highlight this distinction because both parties appear to have merged these two actions in their briefing. Defendants devote only one sentence of

their briefing to the requirements of fraud upon the court and instead focus almost exclusively on the elements of an independent action for relief from judgment. Plaintiff also conflates these standards. However, while Plaintiff has erroneously conflated these two separate sources of authority, Plaintiff should prevail if he can state a claim under either standard rather than having to meet both *Buell v Anderson*, 48 Fed. Appx. 491, 497-98, 2002 WL 31119679, at *6 (6th Cir. 2002). Because it is clear that the basis of Plaintiff's independent action is fraud upon the court, the Court will analyze Plaintiffs claim according to fraud upon the court jurisprudence.[6]

Any discussion of fraud upon the court must begin with *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 64 S.Ct. 997 (1944), which the advisory committee note to rule 60(b) points to as an illustration of fraud upon the court. In *Hazel*, the Plaintiff brought suit in the Third Circuit in 1941 to set aside a judgment entered by that Court against Plaintiff in 1932. *Id.* at 998. Plaintiff, contending that the judgment had been obtained by fraud, established the following facts. *Id.*

In 1926, Defendant had pending in the Patent Office an application to patent a method of pouring glass into molds. *Id.* This patent faced strong opposition from the patent office. *Id.* To surpass this opposition, Defendant decided to publish in a trade journal an article signed by an ostensibly disinterested expert which would describe Plaintiffs patent as a remarkable advance in the art of fashioning glass via machine. *Id.* at 999. Defendant followed through

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[6]Plaintiff spends a substantial portion of his briefing attempting to construct a fraud upon the court standard by repeatedly citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978)and other Rule 60(b)(3) cases from other circuits. The Court finds this attempt to be unpersuasive because the Fifth Circuit has already rejected this sort of analysis in *Fierro v. Johnson*, 197 F.3d 147, 154 n. 13 (5th Cir. 1999). There, the court made it clear that *Rozier* involved a motion brought under Rule 60(b)(3), which is subject to a one year statute of limitations, and not an equitable action for fraud upon the court, which *is* narrower in scope than a claim under Rule 60(b)(3). *Id.* Accordingly, in the future, Plaintiff would be better served by focusing the majority of his briefing on fraud upon the court cases brought as equitable actions instead of those brought under Rule 60(b)(3).

with this plan and later brought suit against Plaintiff for infringement of this patent. *Id.* During trial, Plaintiff received information that the article, which did not play an important role at trial, had been actually authored by one of Defendant's attorneys. *Id.* Plaintiff did not attempt to verify this hearsay and instead relied on other defenses, which proved effective as Plaintiff won at trial. *Id.* However, Plaintiff lost on appeal after the attorneys for Defendant, one of whom had a played a role in preparing the false article for publication, directed the court's attention to the article. *Id.* The reference had the desired effect and the circuit court reversed and held that the patent was valid and had been infringed. *Id.*

Several years later, once this fraud became fully uncovered in an antitrust suit brought against Defendant, Plaintiff brought suit in the circuit court to set aside its earlier judgment. *Id.* at 1000. The circuit court upheld the judgment on the grounds that the fraud was not newly discovered and that the publication, though quoted, was not the primary basis of the earlier decision. Plaintiff appealed to the Supreme Court, which held the following:

> Every element of fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.

Id. at 1001.

The Court rejected the circuit court's conclusion that Plaintiff should be barred from bringing this claim because of his lack of diligence. *Id.* The Court noted that this case did not concern only private parties and that there are "issues of great moment to the public in a patent suit.... Furthermore, tampering with the administration of justice in the manner indisputably shown here

involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public . . . . " *Id.*

The Court also disagreed with the Circuit Court's rejection of Plaintiffs claim on the ground that it was not basic to Plaintiffs decision. *Id.* After noting that it would be virtually impossible to appraise the influence the article had on the judges, the Court concluded that such an analysis was unnecessary in this case because Defendant and his lawyers thought that the article was material and the Court found that "[t]hey are in no position now to dispute its effectiveness." *Id.* at 1002.

This seminal cafe serves as the foundation for all fraud upon the court jurisprudence. Much has been built on that foundation in the last fifty years. The Fifth Circuit undertook a comprehensive review of this subject matter in *Browning v. Navarro, 826* F.2d 335 (5th Cir.1987). There, the Court examined the conduct that has been held sufficient to set aside a judgment procured by fraud. The court began by analyzing *United States v. Throckmorton,* 98 U.S. 61(1878). This case set forth the general rule that intrinsic fraud, that is fraudulent evidence upon which a judgment is based, cannot be the basis to set aside a judgment *Id.* at 344. Extrinsic fraud, however, that is fraud that was not the subject of the litigation, that infects the actual judicial process, can be the basis for setting aside judgment for fraud. *Id.* The Court then noted that *Hazel* expanded the limits set out by *Throckmorton* to allow "a judgment to be attacked on the basis of intrinsic fraud that results from corrupt conduct by officers of the court." *Id.*

After reviewing *Throckmorton, Hazel* and subsequent fraud upon the court cases, the court summarized the composite rationale of those cases as follows:

> [T]o satisfy his burden, [Plaintiff] must demonstrate that the judgment was obtained as a result of a scheme or collusion that is designed to influence the ability of an adverse party to fully present his Case or defense, and which has the effect of foreclosing to him the opportunity to have a fair and complete trial. The

> positions and roles of the participants and the result of the scheme are of the utmost importance determining whether the judgment has been procured or obtained by fraud. To set aside a judgment, the court must be convinced that the trial was rendered so fundamentally unfair by the scheme or collusion that the court lacks confidence that the judgment is, soundly based on law and fact.

Id. at 345. In undertaking this review, the court quoted MOORE'S commonly used definition of fraud upon the court, which states: "Fraud upon the court should embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Id.* at 345, n. 12 (citations omitted). The Court also emphasized that the fraud necessary to set aside a judgment must be the "most egregious conduct." *Id.* And that "the courts have uniformly held that the perjury of a single witness, false evidence (in the, absence of attorney involvement) or mere nondisclosure are insufficient to establish fraud upon the court." *Id.* The Fifth Circuit reiterated this theme when it set forth the law for fraud upon the court in *First National Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996). There, the Court stated:

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. (quotation marks and citations omitted).

Lustig, 96 F.3d at 1573.

Having completed a general overview of the law of fraud upon the court, it is now necessary to delve deeper into the distinct issue of whether the type of malfeasance alleged here, nondisclosure/concealment of evidence combined with misrepresentations to the other party and to the court, can support a claim for fraud upon the court. To begin, as noted above, it is well established that mere nondisclosure is not sufficiently egregious conduct to justify setting aside a judgment. However, a glance at recent precedent, and a closer look at the frequently cited cases that originally set forth the principle that nondisclosure is ordinarily not enough to establish fraud upon the court, shows that there is not, nor has there ever been, a *per se* rule that nondisclosure can never support a claim for fraud upon the court. Indeed, virtually all of these cases indicate otherwise.

For example, *Kuperman v. Consolidated Research and Manfacturing Corp.*, 459 F.2d 1072 (2d Cir. 1972) is often cited for the proposition that nondisclosure will not ordinarily support a fraud upon the court. However, the court in Kuperman based its holding largely on the fact that the attorney was not under any order to produce all relevant documents, nor had he made any misrepresentations. *Id.* at 1080-81. The court concluded by holding that "it would be going too far to characterize as 'fraud upon the court' [the attorney's] failure to disclose an instrument which he could have reasonably - although, as it now appears, erroneously - to have been known to his adversary." *Id.* at 1081. The court had emphasized earlier that an attorney's role as an officer of the court "demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." *Id.* at 1078.

H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976) is another case cited for the general rule that mere nondisclosure will not support a fraud upon the court claim. However, this case does not hold that nondisclosure can never support a fraud upon the court claim. Indeed, in *H.K. Porter Co.*, the

court said:

> Goodyear adds to its allegations of nondisclosure, misrepresentation and perjury, the allegation that Porter's attorneys knew of and sponsored these misdeeds. This is indeed a serious charge .... Since attorneys are officers of the court, their conduct if dishonest would constitute a fraud upon the court.

Id. at 1118-19 (citations omitted). The court eventually rejected Goodyear's claim that certain nondisclosures by Porter constituted a fraud upon the court. The court held that there was no fraud because the court found that Porter didn't disobey any court order, and Goodyear didn't request a court order for many of the documents that he later complained were not produced. *Id.* at 1119-20.The Court also noted that the district judge was in the best position to determine whether the production of documents, which were allegedly withheld, would have made any difference in his holding. *Id.* at 1122.

Recent fraud upon the court precedent also demonstrates that whether a material fraudulent nondisclosure by an attorney will justify setting aside a judgment for fraud upon the court is a fact specific inquiry. In *Pumphrey v. K.W. Tool Co.*, 62 F.3d 1128 (9th Cir. 1995), the Ninth Circuit held that the inhouse counsel, Bartlett, committed a fraud upon the court when he intentionally failed to disclose a videotape of a gun firing with the safety on during a drop test. The Court found it significant that Bartlett had participated in the videotaping of the original undisclosed video and the video shown at trial. *Id.* at 1131. The Court also noted that Barlett had drafted a response to a request for production stating that he wasn't aware of any records regarding the testing of the handguns and that if such records are later discovered he would make them available to Plaintiff. *Id.* Despite this response, Bartlett did not tell Plaintiff about the first drop test video. *Id.* at 1131. Furthermore, Bartlett drafted answers to interrogatories that mischaracterized the results of the drop test. *Id.* at 1132. The court found that these facts proved that Defendant, through Bartlett, engaged in a scheme to defraud the court. *Id.*

The Sixth Circuit has also held that nondisclosure by an officer of the court can support a fraud upon the court claim. *Dejanjuk v. Petrovksy*, 10 F.3d 338, 348 (6th Cir. 1993). In that case, the Court held that "it would be error to exclude from the definition of fraud on the court intentional, fraudulent nondisclosure during discovery." *Petrovksy*, 10 F.3d at 348. The Court then adopted a definition which defined fraud upon the court as consisting of conduct: (1) on the part of an officer of the court; (2) that is directed to the "judicial machinery" itself; (3) that is intentionally false, willfully blind to the truth, or is a reckless disregard for the truth; (4) that is a positive averment or is concealment when one is under a duty to disclose; (5) that deceives the court. *Id.*

The Tenth Circuit, however, while apparently agreeing that nondisclosure may in some circumstance support a claim for fraud upon the court, has explicitly rejected *Petrovsky s* minority position that a reckless disregard for the truth will support a fraud upon the court claim. *Robinson v. Audi Aktiengsellschaft*, 56 F.3d 1259 (10th Cir.1995). In *Robinson*, the court correctly notes that the general formulation of the fraud upon the court doctrine required an *"unconscionable plan or scheme"* and that whatever else this might embody, it definitely requires a showing that "one has acted with an intent to deceive or defraud the court." *Id.* at 1267. After so ruling, the Court upheld the lower court's finding that defendant's counsel had not engaged in a deliberately planned scheme to defraud the court through misrepresentation and nondisclosure because no intent to defraud had been shown. *Id.*

In the case *sub judice*, Plaintiff essentially contends that Chapman committed fraud upon the court when he intentionally withheld the underwriting file, which allegedly contains information relevant to Plaintiff's claims, and made various misrepresentations to the Plaintiff and to the Court regarding the existence of this file.[7]

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[7]Although the Court must accept as true all of Plaintiffs well pleaded facts regarding misrepresentations allegedly made by Chapman, the Court will not accept as true Plaintiff's conclusory statements as to why the Court ruled in a certain manner. For instance, Plaintiff argues that the Court did not hear evidence that the insurance policy was to be an "own

Additionally, Plaintiff alleges that he brought a motion to compel production of this file and that Chapman falsely represented to the court that the underwriting file did not exist. Plaintiff contends that this file was actually in Chapman's possession during this time.

Importantly, Plaintiff alleges that this file contained the presumptive disability document, which states:

> Definitions - In addition to our standard definition of disability we will also consider an Employee to be totally disabled if by reason of sickness or accident he earns less than 50% of his pre-disability "Basic Monthly Earnings[.]" This definition will apply throughout the Maximum Benefit Duration....
>
> The above enhancements to our standard contract will control the administration of the noted provisions but will not become an actual part of the contract document.

Plaintiff asserts that he was entitled to recover under the terms of the enhancement. Whether this provision ever became a part of the policy should be an easy question for the parties to resolve, however neither party has done so. Defendants argue that this clause was not in the contract document attached to plaintiff's complaint. However, by its terms, this enhancement states that it "will control the administration of the noted provisions but will not become an actual part of the contract document." Accordingly, that this language is not found in the contract document is not necessarily conclusive evidence that this enhancement never became part of the plan.

The Court finds it hard to believe that the parties have not been able to come forth with any evidence showing whether Plaintiff's insurance plan had such an enhancement. But, if this enhancement was a part of Plaintiff's plan, then this piece of

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occupation"policy because Chapman represented that this type of coverage was not offered. Complaint at ¶ 16. The Court will give no weight to these types of conclusory statements regarding the Court's reasoning.

evidence would certainly be material to Plaintiffs claim for benefits. Therefore, Chapman's alleged misrepresentations and intentional concealment of this provision could support a claim for fraud upon the court. Contrary to Defendants' assertion, this claim is not barred by the statute of limitations. *See* WRIGHT & MILLER §2870, p. 412 ("There is no time limit for setting aside a judgment [for fraud upon the court]."). The Court also finds that Plaintiff has pled facts sufficient to state a claim for an independent action for relief from judgment. Accordingly, Defendants' motion to dismiss should be denied.

Plaintiffs motion for summary judgment should also be denied. There are fact issues as to whether Chapman made the alleged misrepresentations and concealment and as to whether he made them as part of an unconscionable plan or scheme which was designed to improperly influence the court in its decision. There is also a fact issue as to whether the presumptive disability provision ever became a part of the plan.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Plaintiffs Original Complaint for Independent Action [Doc. 29] and Plaintiffs Motion for Summary Judgment and Brief in Support Thereof [Doc. 43] should be denied.

IT IS SO ORDERED.

Signed this 11th day of February, 2003.

s/Paul Brown
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED
US DISTRICT COURT
§ EASTERN DISTRICT OF TEXAS
§ MAR 22, 2004
§ BY s/Sandra Sauthub

HERMAN E. MITCHELL, Plaintiff,	§	
v.	§	4:01CV30
METROPOLITAN LIFE INSURANCE COMPANY and ALLSTATE LIFE COMPANY, NORTHBROOK, ILLINOIS Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Plaintiffs Motion to Compel Discovery. [Doc. No. 91]. Having considered the motion, response, in camera submission, reply, supplemental in camera submission and response thereto, the Court finds the motion should be granted in part.

BACKGROUND

This case has an extensive history, which has been set forth in a previous order of the Court [Doc. No. 60] and will not be repeated. In short, this case centers on whether a judgment issued by this Court in a previous lawsuit (the "Underlying Lawsuit") should be set aside because Defendants committed fraud upon the court. Many of Plaintiffs allegations of fraud are based on alleged misrepresentations made by Defendant Metropolitan Life Insurance Company's ("MetLife") outside counsel, Carlyle Chapman ("Chapman"). Plaintiff has now moved to compel production of certain documents, which Defendants contend are privileged. Plaintiff asserts that his motion should be granted because: (1) Defendants have not met their burden of establishing the

attorney-client privilege; (2) Defendants have waived the privilege; (3) the attorney-client privilege does not extend to transmittal of documents in response to discovery responses; and (4) all documents must be disclosed pursuant to the crime-fraud exception.

As for waiver, Plaintiff contends that Defendants waived the attorney-client privilege by relying on the affidavits of Chapman and Paul Huck ("Huck") contained in Defendant's Appendix filed in support of Defendants' Response to Plaintiffs Motion for Summary Judgment and Defendants' Motion for Summary Judgment. In Paragraph No. 4 of Huck's affidavit, he testified regarding his response to Request for Production No. 10 in the Underlying Lawsuit, which requested:"The complete underwriting file pertaining to Plaintiff's claim for benefits." There, he stated the following: "Since Request No. 10 specified the underwriting file 'pertaining to Plaintiff's claim for benefits,' I did not believe that there was no [sic] underwriting file just as to Plaintiff's claim, so in response to this Request, Allstate responded None.'" He also explained in Paragraph No. 5 of his affidavit that he was not attempting to hide the existence of the group underwriting file and that, by the time of the deposition of Cheryl Oakes, he mistakenly believed it had been produced. Likewise, in Paragraph No. 5 of his affidavit, Chapman testified: "Since Request No. 10 specified the underwriting file 'pertaining to Plaintiff's claim for benefits,' Paul Huck, the other attorney of record for MetLife, advised that there was no underwriting file just as to Plaintiff's claim. It appeared from the files I was provided by Mr. Huck that Mr. Huck's advice was correct. Therefore, as to Request No. 10, Defendant Allstate's response was None.'" Defendants argue in response that the affidavits do not constitute a waiver because they do not reveal or disclose any privileged or confidential information.

As for crime fraud, Plaintiff contends Chapman misrepresented to the Court that there was no underwriting file to further the fraudulent scheme of preventing Plaintiff from recovering under "own occupation" coverage or the presumptive disability provision, which states:

> In addition to our standard definition of disability we will also consider an Employee to be totally disabled if by reason of sickness or accident he earns less than 50% of his

pre-disability "Basic Monthly Earnings[.]" This definition will apply throughout the Maximum Benefit Duration.... .

The above enhancements to our standard contract will control the administration of the noted provisions but will not become an actual part of the contract document.

Defendants argue in response that the crime fraud exception does not apply because there is no evidence of fraud. They argue that there was no fraud because Plaintiff never requested the group underwriting file, but instead only requested the underwriting file "pertaining to Plaintiffs claim for benefits," which they assert did not exist. Defendants also assert that they had no motivation to commit fraud because the presumptive disability provision did not apply to Plaintiffs claim and that an in camera review will show that there were no efforts on the part of Defendants to further a fraud.

DISCUSSION

The attorney-client privilege prevents disclosure of communications between an attorney and client that were made while seeking or rendering legal services: *See Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The privilege applies whether an attorney works at a law firm or works as in-house counsel for a corporation. *See, e.g., In re Sealed Case, 737* F.2d 94, 99 (D.C.Cir.1984)(concluding that status as an in-house attorney "does not dilute the privilege," but stating that the privilege applies only if the attorney gave advice "in a professional legal capacity").

The elements necessary to establish that material is protected by the federal attorney-client privilege are listed as follows:

(1) the asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made is

(a) a member of a bar of a court, or his subordinate,

and

(b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed

(a) by his client

(b) without the presence of strangers

(c) for the purpose of securing primarily either

(i) an opinion on law or

(ii) legal services

(iii) or assistance in some legal proceeding, and

(d) not for the purpose of committing a crime or tort; and

(4) the privilege has been

(a) claimed and

(b) not waived by the client.

United States v. Mobil Corp., 149 F.R.D. 533, 536 (N.D.Tex.1993).

The burden is on the party asserting the privilege to demonstrate how each document satisfies all the elements of the privilege. *See Hodges, Grant & Kaufmann v. United States, 768* F.2d 719, 721 (5th Cir. 1985). Additionally, the party asserting the attorney-client privilege must prove that waiver by breach of confidentiality did not occur. *Id.* "A client implicitly waives the attorney-client privilege by testifying about portions of the attorney-client communication." *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999). And, "a client's offer of his own or his attorney's testimony as to a specific communication constitutes a

waiver as to all other communications on the same matter [because] 'the privilege of secret communication is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.' " *United States v. Woodall*, 438 F.2d 1324, 1327 (5th Cir.1970)(en banc)(quoting 8 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE §§ 2327, at 638 (1961)); *Ngyuen*, 197 F.3d 200,207-08 n.19.

After carefully considering all of the documents submitted in Defendants' in camera submissions, the Court has determined that these documents are privileged. However, Defendants should be required to produce certain documents, because, by relying on the affidavits of Chapman and Huck, they waived the attorney-client privilege regarding communications as to whether to produce the underwriting file. Chapman's affidavit discloses a confidential communication from Huck regarding advice on whether to produce the underwriting file, and it contains his reasons for not producing it. Likewise, Huck discusses in his affidavit: why he did not believe the group underwriting file should be produced, his lack of fraudulent intent and his mistaken belief that the group underwriting file had been produced by the time of Cheryl Oakes's deposition. Defendants have used their lawyers' testimony as a defense regarding their failure to produce the group underwriting file and, by doing so, have waived the attorney-client privilege with respect to communications related to that subject. Defendants shall produce to Plaintiff the following related documents within 7 days of the signing of this order: Met 001091, Met 003669, Met 003765, Met 003766, Met 004564, Met 004565, Met 003911, Met 003813, Met 003850, Met 003938 and Met 003939.

Aside from waiver, Plaintiff also contends Defendants should be required to produce all privileged documents pursuant to the crime-fraud exception. Under this exception, a "privilege can be overcome where communication or work product is intended to further continuing or future criminal or fraudulent activity." *United States v. Edwards, 303* F.3d 606, 618 (5th Cir. 2002)(internal quotations and citations omitted). Plaintiff "has the burden of establishing a prima facie case that the attorney-client relationship

was intended to further criminal or fraudulent activities." Thus, in determining whether the crime-fraud exception applies, the Court focuses on the client's purpose in seeking legal advice. *Id.* Having reviewed the remaining documents in camera, the Court finds that the crime-fraud exception does not apply to these documents, and Defendants should not be required to produce them.

Finally, within 7 days of the signing of this order, Defendants shall produce to the Court for an in camera inspection all of the documents on Defendants' revised privileged logs that have not already been produced to Plaintiff, or to the Court.

CONCLUSION

For the foregoing reasons, Plaintiffs motion to compel should be granted in part as set forth above.

IT IS SO ORDERED

Signed this 22 nd day of March, 2004.

s/Paul Brown
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED
US DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAR 22, 2004
BY s/Sandra Southerland

HERMAN E. MITCHELL, Plaintiff,	§	4:01CV30
v.	§	
METROPOLITAN LIFE INSURANCE COMPANY and ALLSTATE LIFE COMPANY, NORTHBROOK, ILLINOIS Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is Defendants' Motion for Leave to File Answer. [Doc. No. 79]. Having considered the motion, response, reply and sur-reply, the Court finds the motion should be granted.

BACKGROUND

Plaintiff brought this suit on February 1, 2001, when he filed Plaintiffs Petition and Application for Bill of Review. Defendants filed a motion to dismiss, and the Court, after conducting a hearing on the motion, entered an order denying Defendants' Motion to Dismiss and ordering Plaintiff to replead with particularity. The Court also ordered the parties to brief three legal issues for the Court's consideration. On March 7, 2002, Plaintiff filed an Amended Complaint for Independent Action, contending that Defendants' counsel had committed fraud on the Court in an underlying lawsuit by withholding and concealing evidence and by filing false affidavits and pleadings. Defendants moved to dismiss Plaintiffs Amended Complaint, and Plaintiff filed a motion for summary judgment. On February 12, 2003, the Court entered an order denying Plaintiffs Motion for Summary Judgment and Defendants' Motion to Dismiss. On March 2, 2003, the Court entered

a scheduling order, setting a July 1, 2003 deadline to file pleadings without leave of Court. Defendants did not timely file an answer, and on September 26, 2003, Defendants filed a motion for leave to file Defendants' Original Answer. Defendants contend that their failure to file was based on inadvertence, that Plaintiff will not be harmed, that all of the affirmative defenses and most of the facts forming the basis of Defendants' answer were raised in previous papers and that they will agree to any additional discovery or continuance that may be needed. Plaintiff contends that Defendants have not met their burden and that the motion should be denied.

DISCUSSION

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend a pleading "shall be granted when justice so requires." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The decision to grant leave to amend lies within the discretion of the trial court. Unless there exists a substantial reason for denying leave to amend, the district court should permit the filing of a proposed amendment. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir.1981). In determining whether to grant leave to amend, the court may consider several factors, including undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment. *Foman*, 371 U.S. at 182.

However, Federal Rule of Civil Procedure 16(b) governs the amendment of pleadings after a scheduling order deadline has passed. *S & W Enterprises, L.L. C. v. Southtrctst Bank of Alabama*, 315 F.3d 533, 535-36 (5th Cir. 2003). Under Rule 16(b), a scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge." Fed.R.Civ.P. 16(b). "The good cause standard requires the 'party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.'" *Id.* at 535 (quoting 6A Charles Alan Wright et al., Federal Practice and Procedure § 1522.1 (2d ed. 1990)). Only when the movant demonstrates good cause to modify

the scheduling order "will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave." *Id.* at 536. In determining whether movant has met this burden, the Court should consider: (1) the explanation for the failure to timely move to amend; (2) the importance of the amendment; (3) the potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure any such prejudice. *Id.*

In this case, Defendants' motion should be granted. Although Defendants' explanation of inadvertence is given little weight, the other factors all weigh strongly in favor of allowing Defendants leave to file an answer. The second factor, the importance of the proposed filing, weighs in Defendants' favor, because if leave to file is not granted, Defendants will be severely harmed in that they will have no answer on file. Plaintiff has moved for summary judgment in part based on Defendants' failure to file an answer. Likewise, the third factor weighs in favor of allowing leave. Plaintiff will not be prejudiced by allowing Defendants to file an answer, because Plaintiff was made aware of Defendants' affirmative defenses and the majority of facts that form the basis of Defendants' answer via Defendants' motion to dismiss, Defendants' response to Plaintiff's motion for summary judgment and Defendants' motion for summary judgment. Plaintiff should not be prejudiced or require substantial additional discovery if Defendants are permitted to file an answer. Further, any possible prejudice can be cured by a continuance, which is available, if needed. After weighing all of these factors, the Court finds Defendants have shown good cause under Rule 16(b).

Defendants have also satisfied the lenient requirements of Rule 15(a), which mandates that "leave shall be freely given when justice so requires." A motion to amend under Rule 15(a), should not be denied unless there is a substantial reason to do so. *Jacobsen v. Osborne*, 133 F.3d 315, 318(5th Cir. 1998). In this case, Plaintiff has neither shown undue delay, bad faith or dilatory motive by Defendants, nor has it shown that it will suffer undue prejudice if leave is granted. Defendants seek to facilitate a judgment on the merits, and justice requires that Defendants' motion for leave to file an answer should be granted.

IT IS SO ORDERED.

Signed this 22nd day of March, 2004.

s/Paul Brown
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED - CLERK
US DISTRICT COURT
04 MAR 31 AM 11:30
TEXAS -EASTERN
BY _____

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
	§	
v.	§	
	§	4:01CV30
METROPOLITAN LIFE	§	
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

ORDER

On this day came on for consideration Defendants' Notice of Submission of Documents for *In Camera* Inspection. [Doc. No. 119]. Having carefully reviewed the submissions, the. Court has determined that these documents are privileged and should not he produced.

IT IS SO ORDERED.

Signed this 31st day of March, 2004.

s/Paul Brown
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED - CLERK
US DISTRICT COURT
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TEXAS -EASTERN
BY s/Tanya McEwen

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
	§	
v.	§	
	§	4:01CV30
METROPOLITAN LIFE	§	
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are Plaintiffs Motion for Summary Judgment [Doc. No. 73] and Defendants' Motion for Summary Judgment. [Doc. No. 85]. Having considered the motions, submissions of parties and applicable law, the Court has determined that Defendants' motion should be granted and Plaintiffs motion should be denied.

BACKGROUND

In June of 1989, Plaintiff Herman Mitchell filed a claim for long-term disability ("LTD") benefits under the Herring Marathon Group, Inc. Long Term Disability Plan (the "Plan"), claiming disability based on vision problems. Plaintiff made this claim shortly before submitting his resignation to his employer, Herring Marathon Group, Inc. Defendant Metropolitan Life Insurance Company ("MetLife") denied Plaintiffs claim, and in May of 1990 Plaintiff brought suit against Defendants MetLife and Allstate Life Insurance Company, Northbrook, Illinois ("Allstate"). After a bench trial, the Court entered judgment in favor of Defendants on January 6, 1993, holding the Plan Administrator had not abused her discretion in finding Plaintiff was not totally disabled under the Plan.

Plaintiff filed a motion for new trial, which this Court denied. Plaintiff appealed this Court's rulings, and the Fifth Circuit affirmed.

Plaintiff then filed a second lawsuit against Allstate in the Northern District of Texas for fraud in the sale of the insurance policy. During discovery in that lawsuit, Plaintiff received the underwriting file, which Plaintiff had requested production of in the original lawsuit in this Court and Defendants had refused to produce, contending that it did not exist. The district court in the second lawsuit entered summary judgment on the grounds of *res judicata* and limitations, and the Fifth Circuit affirmed. In doing so, the Fifth Circuit suggested that Plaintiff could possibly have grounds to bring an independent action to set aside this Court's original judgment. Plaintiff brought suit in State court against Defendants' attorney in the Underlying Lawsuit, Carlyle Chapman, for fraud, among other things. The state court granted Chapman's motion for summary judgment, and, on January 28, 2000, the Dallas court of appeals affirmed the judgment, holding that Plaintiff had no cause of action against Chapman.

On February 1, 2001, Plaintiff filed an independent action for fraud upon the court, alleging that Defendants had intentionally withheld an underwriting file that Plaintiff had requested in discovery in the original suit. Allegedly this underwriting file proved that the Plan should have provided own occupation coverage and contained a presumptive disability provision that supposedly would have allowed Plaintiff to automatically recover LTD benefits. This provision, which was part of a coverage card, stated: "In addition to our standard definition of disability we will also consider an Employee to be totally disabled if by reason of sickness or accident he earns less than 50% of his pre-disability 'Basic Monthly Earnings.' This definition will apply throughout the Maximum Benefit Duration". On February 12, 2003, this Court denied Defendants' motion to dismiss, finding that Plaintiff had adequately stated a claim for fraud upon the court.

Extensive discovery has now been completed, and Defendants have moved for summary judgment primarily on the basis that Plaintiff never qualified to recover under the allegedly wrongfully withheld provision. Defendants have brought forth evidence showing that Plaintiff's employment with Herring Marathon Group ended because of a buyout and not because of Plaintiff's vision problems. Defendants have also demonstrated that Plaintiff had not earned less than 50% of his pre-disability Basic Monthly Earnings by reason of sickness or

accident when he made his LTD claim. At trial Plaintiff admitted that he had informed MetLife's Plan Administrator there was no medical reason for his resignation. In his response, Plaintiff has offered virtually no evidence or argument to prove the presumptive disability provision should have been applied to his claim, but instead has focused largely on whether Defendants intentionally refused to produce the underwriting file.

According to Defendants, there was no fraudulent plan or scheme designed to influence the Court in its decision. They contend they did not produce the group underwriting file because Plaintiff never requested it in a properly framed discovery request. They maintain Plaintiff requested the underwriting file "pertaining to Plaintiff's claim for benefits," which they claim did not exist, and not the group underwriting file. However, in responding to Plaintiffs motion to compel, Defendants referred to the underwriting file, which they contended did not exist, as the underwriting file "regarding the aforementioned group policy." During discovery in the underlying lawsuit, Defendants did, however, produce to Plaintiff the Allstate claims manual, which discussed how presumptive disability provisions should be applied. Under the heading "Gainful Employment," the manual explains that:

> Some contracts also specify that, in order to be considered totally disabled, the insured must not be engaged in any gainful employment. However, this restriction may be waived while the employee is a participant in a rehabilitation or partial disability program. Note the following example:
>
> In addition to the definition of total disability, Metropolitan Life will presume an individual to be totally disabled if there is a 50% loss in earnings as a result of an injury or sickness. This clause will apply during and following the elimination period.

Plaintiff contends Defendants withheld the underwriting file as part of a fraud upon the court.

SUMMARY JUDGMENT STANDARD

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of initially demonstrating the absence of a genuine issue concerning any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554 (1986). The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Federal Rule of Civil Procedure 56 does not impose a duty on a district court to "sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citations omitted).[1] Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. Civ. P. 56(e). The nonmovant must also articulate the precise manner in which evidence he sets forth supports his claims. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.1994) (citations omitted). If the nonmovant fails to set forth specific facts to support an essential element in that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its claim, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to

---

[1]The Court also notes that Local Rule CV-56(b) states that a party's response to a summary judgment motion should "be supported by appropriate citations to proper summary judgment evidence ...." Local Rule CV-56(c) further states that the Court "will not scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact...."

return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986)(citations omitted).

DISCUSSION

Independent actions are to "be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46, 118 S.Ct 1862, 1867 (1998) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S.Ct. 997, 1000 (1944)). They "should be available only to prevent a grave miscarriage of justice." *Beggerly*, 524 U.S. at 47, 118 S.Ct. at 1868. In *First National Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996), the Fifth Circuit summarized the fraud on the court jurisprudence as follows:

> To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision. Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

Lustig, 96 F.3d at 1573. (quotation marks and citations omitted). "[T]o satisfy his burden, [Plaintiff] must demonstrate that the judgment was obtained as the result of a scheme or collusion that is designed to influence corruptly the proceedings, or to inhibit the ability of an adverse party to fully present his case or defense, and which has the effect of foreclosing to him the opportunity to have a fair and complete trial." *Browning v. Navarro*, 826 F.2d 335, 345 (5th Cir. 1987). "To set aside a judgment, the court must be convinced that the trial was rendered so fundamentally unfair by the scheme or collusion that the court lacks confidence that the judgment is soundly based on law and

fact." *Id.*

For suppression of documents to constitute a fraud upon the court, the aggrieved party must prove that the wrongly withheld documents were material and that the suppression of these documents prevented the party from fully and fairly presenting its claim or defense. *United States v. Standard Oil Co.*, 73 F.R.D. 612, 616 (N.D. Cal. 1977), *rev'd on other grounds*, *603* F.2d 100 (9th Cir. 1979); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972) (suppression of documents that are ultimately found to be irrelevant is not a fraud on the court); *United States v. McVeigh*, *9* Fed. Appx. 980, 983, 2001 WL 619765, *2 (10th Cir., June 7, 2001) (materiality is a fundamental element of claim of fraud upon the court claim); *United States v. Bey*, 2003 WL 22462505, *3 (D. Kan., October 10, 2003) (same); *United States v. MacDonald*, 1998 WL 637184, *4 (4th Cir., July 31, 1998) (same). Moreover, the district judge is in the best position to determine whether the documents were material and whether their production would, or could, have made any difference in the underlying lawsuit. *See H.K. Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115,1122 (6th Cir. 1976).

The Court recognizes that in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997 (1944) the Supreme Court held that attorneys, who had supported a claim of patent infringement with a falsified article and had prevailed, were "in no position ... to [later] dispute [the falsified article's] effectiveness." *Hazel-Atlas Glass Co.*, 322 U.S. at 247, 64 S.Ct. at 1002. This reasoning undoubtably should be applied to cases involving egregious conduct such as the presentation of falsified evidence by an attorney or the bribery of a judge, because in those circumstances, it would be difficult, if not impossible, to determine what effect the malfeasance had on the underlying decision, and because the decision itself would likely be tainted to some degree. However, in fraud upon the court cases involving nondisclosure, a party seeking to overturn a prior judgment is, and should be, required to prove materiality. To hold otherwise would require parties to needlessly relitigate claims upon which they have no chance of prevailing, and would be a rejection of the Supreme Court's admonition that an action in equity to set aside a judgment "should be available only to prevent a grave miscarriage of

justice." *Beggerly,* 524 U.S. at 47, 118 S.Ct. at 1868.

Defendants' motion for summary judgment should be granted, because Plaintiff could not have recovered under the presumptive disability provision. By its terms, this provision only applied if an employee earned less than 50% of his pre-disability Basic Monthly Earnings by reason of sickness or accident. Although Defendants have now admitted that it was their practice to apply this provision, the evidence demonstrates that Plaintiff never qualified to recover under the provision, because he never earned less than 50% of his pre-disability Basic Monthly Earnings by reason of sickness or accident during the time of the Plan's coverage.

On June 20, 1989, Plaintiff completed an application for disability benefits based on vision problems he had been suffering from since May of 1987, as a result of niacin ingestion. Despite these problems, Plaintiff had been able to work from May of 1987 through June 30, 1989, performing the same duties for Herring Marathon Group he had performed before his vision troubles began. Plaintiff resigned his position at Herring Marathon Group on June 30, 1989, as part of a buy out of Herring Marathon Group, and he testified at trial that he had decided to apply for disability benefits once he learned that Buddy Herring ("Mr. Herring"), his long time employer, did not intend to rehire Plaintiff after the buyout. Plaintiff admitted that Mr. Herring never told him that the problems with his eyesight had anything to do with his decision to not continue Plaintiff in his employ, and when Plaintiff filed for disability, Mr. Herring refused to agree that Plaintiff was disabled or that he had lost his job as a result of his eyesight. Plaintiff testified that if Mr. Herring would have retained him, he, being a loyal soldier, would have continued to work, although he did not feel he could perform at his previous level.

In July of 1989, after Plaintiffs resignation, Plaintiff told the MetLife Plan Administrator that there was no medical reason for his termination of employment and that his only problem was his inability to do detailed reading, a problem he had been suffering from for two years. Although Plaintiff had suffered from vision problems for two years prior to his resignation, he had continued to work and be paid throughout that period. Aside from Plaintiff's conclusory allegation in his affidavit, there is no evidence that Plaintiff earned less than 50% of

his pre-disability Basic Monthly Earnings by reason of sickness or accident after his resignation. In sum, Plaintiff was working and being paid in full when he made his LTD claim, and Plaintiff's decrease in earnings was caused by his resignation, and not by his vision problems.

The inapplicability of the presumptive disability provision to Plaintiff's claim undercuts Plaintiff's contention that Defendants withheld the underwriting file as part of a scheme to defraud the Court, and it strengthens Defendants' assertion that they did not intend to defraud the Court and that they withheld the documents as part of a discovery dispute over the scope of Plaintiff's request. Although the Court does take issue with the wording of Defendants' response to Plaintiff's motion to compel, where Defendants referred to the underwriting file "regarding the aforementioned group policy," it cannot find Defendants filed that filing and withheld the underwriting file as part of a scheme to defraud the court.

Defendants' motion for summary judgment should be granted. Plaintiff did not qualify to recover under the presumptive disability provision, and therefore Defendants' withholding of this document did not have "the effect of foreclosing to [Plaintiff] the opportunity to have a fair and complete trial." *Browning v. Navarro*, 826 F.2d 335, 345 (5th Cir. 1987); *see also Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972); *HK Porter Co., Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1122 (6th Cir. 1976). Moreover, having carefully reviewed the evidence, the Court is not "convinced that the trial was rendered so fundamentally unfair by the scheme or collusion that the court lacks confidence that the judgment is soundly based on law and fact." *Browning*, 826 F.2d at 345. On the contrary, the evidence shows, and the Court is convinced, that the judgment is sound and that there has not been a grave miscarriage of justice. Defendants' motion for summary judgment should be granted as to Plaintiffs claim for fraud upon the Court. For the same reasons, summary judgment should also be granted as to any claim Plaintiff may be asserting for an independent action to obtain relief from a prior judgment, because this is not "a judgment which ought not, in equity and good conscience, . . . be enforced," and Plaintiff does not have a good claim. *Addington v. Farmer's Elevator Mut. Ins. Co.* 650 F.2d 663, 667-68 (5th Cir.1981).

Aside from the presumptive disability provision, Plaintiff also

argues that Defendants committed fraud upon the Court by providing Plaintiff with a copy of the policy that was missing certain pages. Plaintiff has now conducted extensive discovery and has not established what, if anything, was contained on those missing pages. Further, Plaintiff never moved to compel production of these missing pages, and therefore Defendants could not have committed fraud upon the court by not producing them. *See HK Porter Co., 536* F.2d at 1119-20.

Finally, Plaintiff argues Defendants wrongly withheld the underwriting file because it demonstrated that the definition of total disability was to include "own occupation" coverage. The Court does not find this argument persuasive. Plaintiff's insurance policy defined "totally disabled" as one who "is completely and continuously unable to do **each** of the material duties of **his** job; and requires the regular care and attendance of a Physician." (emphasis added). The Plan's terms reflect that to be considered totally disabled, one must be unable to do each of the material duties of his own job or occupation, and not any job or occupation. This interpretation is consistent with "own occupation" coverage, and Plaintiff has not shown that the Plan Administrator applied the wrong definition to his claim or that Defendants committed any fraud upon the court with respect to the Plan's definition of total disability.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be granted, and Plaintiffs motion for summary judgment should be denied.[2]

---

[2]Defendants' Motions for Leave to File Supplemental Appendixes [Doc. No. 126, 130] should also be denied as untimely and unnecessary to the resolution of this matter. Plaintiffs Motion for Continuance to Conduct Additional Discovery [Doc. No. 116] should be denied. Plaintiff has had ample time to conduct discovery and to produce evidence demonstrating whether he qualified to recover under the presumptive disability provision, and he has failed to do so. Moreover, allowing Plaintiff to depose Chapman and Huck further regarding their intent in not producing the underwriting file would not help Plaintiff demonstrate whether he qualified under the withheld provision and would merely prolong this litigation.

IT IS SO ORDERED.

Signed this 17th day of May, 2004.

s/Paul Brown
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FILED - CLERK
US DISTRICT COURT
04 MAY 17 PM 2:00
TEXAS -EASTERN
BY _____

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
	§	
v.	§	
	§	4:01CV30
METROPOLITAN LIFE	§	
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion and Order of even date herewith, it is hereby

ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment is denied and Defendants' Motion for Summary Judgment is granted. It is further

ORDERED and ADJUDGED that Defendants shall recover from Plaintiff their costs of court. It is further

ORDERED and ADJUDGED that all relief sought by either party not granted herein is hereby denied.

SIGNED this 17th day of May, 2004.

s/Paul Brown
United States District Judge

First page of Coverage Card

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Name of Account	Account/Policy No.
Herring Marathon, Inc.	64402935

[sections omitted]

Special Provisions/Revisions
SP1 - Class I, II, III - 30 days: Class IV -90 days
SP2 - Class I and II -own occupation to age 65; Class III and IV -own occupation for first two years of benefits.

Group Department-Weekly Income Coverage Card
Allstate Insurance Company

Second page of Coverage Card

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Name of Account	Account/Policy No.
Herring Marathon, Inc.	64402935

[sections omitted]

SP1
Presumptive Disability/Rehab. Administrative Procedure

1. Definitions-In addition to our standard definition of disability we will also consider an Employee to be totally disabled if by reason of sickness or accident he earns less than 50% of his predisability "Basic Monthly Earnings". This definition will apply throughout the Maximum Benefit Duration.

2. Rehabilitative Employment Benefit- This provision will be modified to delete the 24 month restriction of the reduced Monthly Benefit. The effect of this change will be to potentially provide a rehabilitation benefit to the end of the Maximum Benefit Duration.

The above enhancements to our standard contract will control the administration of the noted provisions but will not become an actual part of the contract document.

Group Department-Weekly Income Coverage Card
Allstate Insurance Company

Filed -Clerk-US District Court
Eastern District of Texas,
March 22, 2002

Portions of Page Numbered 13 under "Termination of Insurance" from Insurance Policy

The end of insurance will not affect any claim made for a disability that began while the insurance was in force;

Portions of Pages Numbered 16 and 17 under "Recurrent Disability" from Insurance Policy

If, after the period of Total Disability for which benefits have been paid under this policy, the insured Employee:
-resumes his regular job on a full-time basis; and
-does all the material duties for less than six consecutive months;
any Recurrent Disability will be a part of the same period of Total Disability. Allstate's liability for the entire period will be subject to the terms of this policy for the prior disability.
If, after a period of Total Disability for which benefits have been paid under this policy, the insured Employee:
-resumes his regular job on a full-time basis; and
-does all the material duties for six consecutive months or more;
any Recurrent Disability will be treated as a new period of Total Disability. The Employee must complete a new Elimination Period before monthly benefits are payable.
If the insured Employee becomes eligible for coverage under any other group long-term disability policy, this Recurrent Disability provision will not apply.
"Recurrent Disability" means a disability which is related or due to the same cause(s) of a prior disability for which a monthly benefit was payable.

Portions of Page Numbered 33 under "Entire Contract" from Insurance Policy

Allstate cannot use a statement by an Employee to deny a claim, unless the statement is in a written application signed by the Employee.

Filed -Clerk-US District Court,
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Handwritten Note on October 2, 1990 from Cheryl Oakes To Attorney Paul Huck

Privileged & Confidential

Date 10/2 ,1990

REDI-NOTE

TO Paul Hook, Area 7-C
SUBJECT Herman Mitchell

Per your request please find the underwriting files on the Herring Marathon Group Inc.

If I can be of further assistance, please advise.

Signed s/Cheryl Oakes

Metropolitan Life Insurance Company
One Madison Avenue, New York, NY 10010-3690
(212) 779-1490 Fax: (212) 696-0541 ✱ **Metropolitan Life And Affiliated Companies**

Law Department
(212) 578-8872

Filed U.S. District Court
Eastern District of Texas
April 13, 2004

SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

VIA FAX
James Dean Hodapp
Counsel
Allstate Life Insurance Company
Life Law & Regulation Department
3100 Sanders Road
Northbrook, Illinois 60062

Re: Mitchell v. Metropolitan Life Ins. Co. et. al.

Dear Mr. Hodapp:

Enclosed, for your review, are Allstate's proposed responses to Interrogatories and Request for Production in the above matter. Please review and notify me if anything is factual incorrect.

We will need to determine the identity of any Allstate underwriting or sales personnel who were involved in the original writing of the Herring Marathon Group Policy. Additionally, we may need to produce the original underwriting file for that group.

Please call me after you have reviewed the enclosures or if you have any questions on this matter.

Sincerely,
s/Paul Huck
Paul G. Huck
Attorney
September 25, 1990

MET 003911

Metropolitan Life Insurance Company
One Madison Avenue, New York, NY 10010-3690
Fax (212) 779-1490 Fax: (212) 696-0541 ✱ **Metropolitan Life**
Fax (212) 679-8474 **And Affiliated Companies**

Law Department
(212) 578-8872

Filed U.S. District Court
Eastern District of Texas
April 13, 2004

VIA FEDERAL EXPRESS

Carlyle H. Chapman, Jr., Esquire
Chapman & Reese
2700 Stemmons Freeway
500 Stemmons Tower East
Dallas, Texas 75207

Re: Mitchell v Metropolitan Life Ins. Co.
Allstate's responses

Dear Carlyle:

Enclosed are Allstate's responses to Plaintiffs Interrogatories and Production demands. Also enclosed are the original group underwriting files which should not be produced at this time as there was no individual underwriting of Plaintiff.

Please amend Metropolitan's response to reflect the additional individuals with relevant knowledge, Jenifer McMaken, Babs O'Leary and Shirley Hughes. Ms O'Leary is the only one who could be produced by Metropolitan as she was an Allstate employee and is now a Metropolitan employee. Ms. McMaken is now employed by Phoenix Mutual. Ms. Hughes was and is employed by EBC Gulf States who acted as the Plan Administrator.

MET 003850

Please call me if you have any questions or wish to make any changes to these responses.

Sincerely,

s/Paul Huck

Paul G. Huck
Attorney

Enclosures.

MET 003850

The MGHerring Group Inc.

MG Herring Jr.
President

Filed U.S. District Court
Eastern District of Texas
March 25, 2005

September 19, 1989

Allstate
METPlans
GBO Premium and Correspondence
P.O. Box 9052
North Suburban, IL 60197-9052

Re: Herman E. Mitchell
Disability Income Benefits
Policy No. 64402935

Dear Sir:

In May of 1987, I first became aware of the fact that Herman Mitchell, Vice President of Administration of the Herring Marathon Group Inc., had suffered an injury to his eyes as a result of taking certain medication during the previous year. Over the next two years and up to his resignation on June 30, 1989, Herman's job performance declined from that of the previous 10 years.

Marathon U.S. Realties, Inc., the majority stockholder and myself, formerly President of Herring Marathon Group Inc., negotiated a buy out of all minority stockholders as of June 30, 1989, and a release of such stockholders' personal liabilities. The terms of this buyout included, among many other matters, an early cancellation of an employment contract held by myself and other officers, including Herman.

I then formed a new real estate development company with several former officers, but did not include Herman. However, Herman was considered for the new company and in fact, we had several discussions relating to the structure and responsibilities of the officers for the new company.

In consideration of an early termination of his employment contract, a consulting agreement was executed by Marathon U.S. Realties, Inc., whereby compensation for Herman will continue until December 31, 1989.

I do not feel that I am qualified to determine whether or not Herman's eye condition caused or contributed to his performance. However, I hope this letter will be of assistance in your consideration of his claim.

Sincerely,

s/Buddy Herring

MGHJ r/rc
cc: Herman E. Mitchell
exel.121

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 22, 2002

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	Cause No. S-90-125-CA
METROPOLITAN LIFE	§	
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

PLAINTIFF'S SECOND REQUEST FOR PRODUCTION TO ALLSTATE LIFE INSURANCE COMPANY

TO: Allstate Life. Insurance Company by and through its attorney of record Carlyle H. Chapman, Jr., Chapman & Reese, P.C., 1200 Stemmons Place, 2777 Stemmons Freeway , Dallas, Texas 75207.

HERMAN E. MITCHELL, Plaintiff, requests that Defendant, ALLSTATE LIFE INSURANCE COMPANY, produce for discovery under the provisions of Rules 33 and 34 of the Federal Rules of Civil Procedure, the items specified in the paragraphs below, at our Dallas address within 30 days after you receive these Request for Production.

I.

Definitions

As used in the following requests for production:

(a) "Plaintiff means Herman E. Mitchell, his agents or representatives.

(b) "Defendant" or the name of a party or business organization shall specifically include all employees, agents, representatives, and

attorneys of Defendant, ALLSTATE LIFE INSURANCE COMPANY.

(c) The term "document(s)" specifically includes original and nonidentical copies, whether by reason of marginal or other notes, or alterations of papers, books, correspondence, computer records maintained in any form, video recordings, audio recordings,- medical or hospital records, accounts and any other material regardless of the method of its preservation.

(d) "Insurance Policy" means the policy of insurance attached to Plaintiff's Original Petition as Exhibit "A".

(e) "The date of your refusal to pay benefits" shall mean the date that you refused to provide disability payments to Plaintiff.

Production

In the Insurance Policy the following language appears on page 21:

"Total Disability or Totally Disabled means the Employee is completely and continuously unable to do each of the material duties of his job; and require the regular care and attendance of a Physician".

The foregoing is here referred to as the "Definition".

1. Produce all documents and memos concerning the formulation of this Definition.

2. Produce all documents and memos concerning the marketing of what this Definition covers and does not cover as represented to other insurance companies, insurance agents, insurance salesmen and as represented to the public.

3. Produce all documents concerning Metropolitan Life Insurance Company's interpretation of what the Definition means.

Respectfully Submitted,
RASHTI AND MITCHELL
ATTORNEYS AT LAW

By: s/Timothy Mitchell
Timothy T. Mitchell
State Bar No. 14223000
7727 Willow Vine Court
Suite 129
Dallas, Texas 75230
(214) 490-1929
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Second Request for Production to Defendant Allstate Life Insurance Company was sent via Federal Express with a copy via certified mail, return receipt requested to:

Carlyle H. Chapman, Jr.
Chapman & Reese, PC
1200 Stemmons Place
2777 Stemmons Freeway
Dallas, TX 75207
Attorney for Defendant

on this the 8th day of November, 1990.

s/Timothy Mitchell
Timothy T. Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 22, 2002

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
METROPOLITAN LIFE	§	S-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

RESPONSE TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION TO ALLSTATE LIFE INSURANCE COMPANY

TO: Herman E. Mitchell, Plaintiff, by and through his attorney of record, Timothy T. Mitchell, Esq., Rashti & Mitchell, Suite 129, 7727 Willow Vine Court, Dallas, TX 75230.

COMES NOW, Allstate Life Insurance Company, Defendant in the above-entitled and numbered cause, and pursuant to Rule 34, Federal Rules of Civil Procedure, makes this, its Response to Plaintiff's Second Request for Production, and for same would show as follows:

1. Such documents to which reference is made in the instant Request are not readily available to Defendant Allstate Life Insurance Company; however, a search for such documents has been initiated and at such time as the referenced documents are located same will be provided to Plaintiff in supplementation of this Response, to the extent same exist and are available.

2. Such documents to which reference is made in the instant Request are not readily available to Defendant Allstate Life Insurance Company; however, a search for such documents has been

initiated and at such time as the referenced documents are located same will be provided to Plaintiff in supplementation of this Response, to the extent same exist and are available.

3. Such documents to which reference is made in the instant Request are not readily available to Defendant Allstate Life Insurance Company; however, a search for such documents has been initiated and at such time as the referenced documents are located same will be provided to Plaintiff in supplementation of this Response, to the extent same exist and are available.

Respectfully submitted,
CHAPMAN & REESE
A Professional Corporation

s/Carlyle Chapman
Carlyle Chapman, Jr.
State Bar No. 04134500
Attorney for Defendants
2777 Stemmons Freeway
1200 Stemmons Place
Dallas, Texas 75207
214/638-3600
214/638-6640 (Fax)

Certificate of Service

I do hereby certify that a true and correct copy of the foregoing instrument has this 7th, day of Dec., 1990, been mailed to Timothy T. Mitchell, Esq., Rashti & Mitchell, Suite 129, 7727 Willow Vine Court, Dallas, TX 75230.

s/Carlyle Chapman
Carlyle Chapman, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 22, 2002

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
METROPOLITAN LIFE	§	S-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AMENDED NOTICE OF SUBPOENA DUCES TECUM

TO: Metropolitan Life Insurance Company, by and through its attorney of record Carlyle H. Chapman, Jr. 2777 Stemmons Freeway, 1200 Stemmons Place, Dallas, Texas 75207.

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, the oral deposition of Cheryl Oaks will be taken on March 28, 1991 beginning at 10:00 a.m. at the offices of McCorkle Court Reporters, 188 West Randolf, Suite 509, Chicago, Illinois 60601. You are invited to attend and participate as you see fit.

YOU ARE NOTIFIED that the Plaintiff wishes to examine the witness so designated relative to the facts and allegations made the basis of this suit.

YOU ARE FURTHER NOTIFIED that the witness is to produce at the above designated time and place the following items:

All records, notes, memoranda, letters, reports and writings of any kind; and photographs and depictions of any character relating

to the claims made by and allegations of Plaintiff in the instant cause and not previously provided to the Plaintiff herein.The initial complaint (petition or like) an initial answer (or like name of the initial responsive pleading to the lawsuit) relating to each lawsuit filed against you for the past five (5) years involving an allegation of "bad faith", unfair practices in the business of insurance, unconscionable action or courses of action, violation of Article 21.21 of the Texas Insurance Code, breach of the duty of good faith and fair dealing, violation-of ERISA, any violation of any statute, rule or regulation relating to the business of insurance, or any similar claim.

The initial letter and the initial response letter relating to any complaint to you relating to your failure to pay a claim or your delay in payment of a claim made pursuant to any policy issued by you.

A copy of your most recent annual statement concerning *your* financial condition, that you allege is available to the public.

All documents letters, memorandums, notes, (handwritten or typed) or other sources of information used by you to form your decisions to deny payment of Plaintiff's claim that is the subject of this lawsuit.

Any documents letters and other notes (handwritten or typed) relating to the sale of the policy that is the subject of this lawsuit.

Any documents, letters and or other notes (handwritten or typed) relating to your denial of Plaintiff's claim that is thesubject of this lawsuit.

All documents, letters or other notes (handwritten or typed) submitted to IRP Medical & Rehabilitation Group for their consideration of the claim that is the basis of this lawsuit and all documents, letters or other notes (handwritten or typed submitted by IRP Medical & Rehabilitation Group submitted to you in response to their review of the claim which is the basis of this lawsuit.

All documents, letters or other notes (handwritten or typed) submitted to Underwriting Medical Actuarial Consultants for their consideration of the claim that is the basis of this lawsuit and all documents, letters or other notes (handwritten or typed submitted by Underwriting Medical Actuarial Consultants submitted to you in response to their review of the claim which is the basis of this lawsuit.

The deposition will be take by McCorkle Court Reporters, certified court reporters.

Respectfully Submitted,

By: s/Timothy Mitchell
Timothy T. Mitchell
Rashti and Mitchell
Attorneys at Law
State Bar No. 14223000
7727 Willow Vine Court
Suite 129
Dallas, Texas 75230
(214) 490-1929

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March 1991, a true and correct copy of the above and foregoing was served via Federal Express to:

Carlyle H. Chapman, Jr.
1200 Stemmons Place
2777 Stemmons Freeway
Dallas, TX 75207

Mr. Paul G. Huck
One Madison Avenue
New York, New York 10010-3690

s/Timothy Mitchell
Timothy T. Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 22, 2002

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
METROPOLITAN LIFE	§	S-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AMENDED NOTICE OF SUBPOENA DUCES TECUM

TO: Allstate Life Insurance Company, Northbrook, Illinois, by and through its attorney of record Carlyle H. Chapman, Jr., 2777 Stemmons Freeway, 1200 Stemmons Place, Dallas, Texas 75207.

PLEASE TAKE NOTICE that pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, the oral deposition of a representative of Allstate Life Insurance Company, Northbrook Illinois having the most knowledge about this case will be taken on March 28, 1991 beginning at 12:00 noon at the offices of McCorkle Court Reporters, 188 West Randolf, Suite 509, Chicago, Illinois 60601. You are invited to attend and participate as you see fit.

YOU ARE NOTIFIED that the Plaintiff wishes to examine the witness so designated relative to the facts and allegations made the basis of this suit.

YOU ARE FURTHER NOTIFIED that the witness is to produce at the above designated time and place the following items:

All records, notes, memoranda, letters, reports and writings of any kind; and photographs and depictions of any character relating to the claims made by and allegations of Plaintiff in the instant cause and not previously provided to the Plaintiff herein.

The initial complaint (petition or like) and initial answer (or like name of the initial responsive pleading to the lawsuit relating to each lawsuit filed against you for the past five (5) years involving an allegation of "bad faith", unfair practices in the business of insurance, unconscionable action or courses of action, violation of Article 21.21 of the Texas Insurance Code, breach of the duty of good faith and fair dealing, violation of ERISA, any violation of any statue, rule or regulation relating to the business of insurance, or any similar claim.

The initial letter and the initial response letter relating to any complaint to you relating to your failure to pay a claim or your delay in payment of a claim made pursuant to any policy issued by you.

A copy of your most recent annual statement concerning your financial condition, that you allege is available to the public.

All documents, letters, memorandums, notes, (handwritten or typed) relating to the sale of the policy that is the subject of this lawsuit.

All documents, letters, and other notes, (handwritten or typed) relating to the sale of the policy that is the subject of this lawsuit.

Any document, letters and/or other notes (handwritten or typed) relating to your denial of Plaintiff's claim that is the subject of this lawsuit.

All documents, letters or other notes (handwritten or typed) submitted to IRP Medical & Rehabilitation Group for their consideration of the claim that is the basis of this lawsuit and all documents, letter or other notes (handwritten or typed submitted by IRP Medical & Rehabilitation Group submitted to you in response to their review of the claim which is the basis of this lawsuit.

All documents, letters or other notes (handwritten or typed) submitted to Underwriting Medical Actuarial Consultants for their consideration of the claim that is the basis of this lawsuit and submitted by Underwriting Medical Actuarial Consultants submitted to you in response to their review of the claim which is the basis of this lawsuit.

The deposition will be take by McCorkle Court Reporters, certified court reporters.

Respectfully Submitted,

By: s/Timothy Mitchell
Timothy T. Mitchell
Rashti and Mitchell
Attorneys at Law
State Bar No. 14223000
7727 Willow Vine Court
Suite 129
Dallas, Texas 75230
(214) 490-1929

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March 1991, a true and correct copy of the above and foregoing was served via Federal Express to:

Carlyle H. Chapman, Jr.
1200 Stemmons Place
2777 Stemmons Freeway
Dallas, TX 75207

Mr. Paul G. Huck
One Madison Avenue
New York, New York 10010-3690

s/Timothy Mitchell
Timothy T. Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 22, 2002

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
METROPOLITAN LIFE	§	S-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND/OR FOR SANCTIONS

COME NOW Metropolitan Life Insurance Company and Allstate Life Insurance Company, Northbrook, Illinois, Defendants in the instant cause, and present this, their response to Plaintiff's Motion to Compel Discovery and/or for Sanctions, and in support thereof would respectfully show as follows:

I.

Allstate Life Insurance Company ("Allstate") originally issued a group insurance policy to Plaintiff's former employer, Herring Marathon Group, Inc. to provide its employees with certain coverage under Herring Marathon Group, Inc.'s group insurance plan (the "Plan"). Subsequently, Metropolitan Life Insurance Company ("Metropolitan") undertook the administration of the group insurance policy issued by Allstate.

II.

Plaintiff has sought from Defendants an "underwriting file" which Plaintiff alleges should be in existence regarding the

aforementioned group insurance policy. Although Defendant Allstate has responded that after a diligent search, the requested file cannot be located, Plaintiff continues to take the position "that there must be an underwriting file..." Plaintiff, therefore, continues to harass Defendants to produce, that which it cannot. Plaintiff was informed on March 28, 1991 during his deposition of Cheryl Oakes, a Metropolitan representative, that a diligent search had been made for the requested file and none was found. That response has been reaffirmed in the attached affidavit of Cheryl Oakes which is made a part hereof as if set forth fully. Plaintiff has now filed his Motion to Compel Discovery and/or for Sanctions for Defendants' failure to produce such underwriting file. Such motion is without merit and is made simply for the purpose of harassment of Defendants.

III.

Plaintiff takes the position that there must be an underwriting file in the possession of either Allstate or Metropolitan. Without any evidence that Defendants are withholding the file from him, or that the file even exists, Plaintiff has filed to compel the production of what he assumes exist. Such motion, without any evidence that Defendants have such file and are withholding it from discovery, is ludicrous.

IV.

If Plaintiff was serious about determining whether or not Defendants had such an underwriting file, other sources are available to test Defendants' assertion. However, rather than seeking to test Defendants' assertions made in response to his discovery request by confirming through other sources the existence or non-existence of such file, Plaintiff has chosen the tactic of attempting to employ this Court's assistance in the harassment of Defendants. Such action should not be aided by this Court.

V.

As Plaintiff's Motion to Compel Discovery and/or for Sanctions is merely filed for the purpose of harassment, and has caused Defendants to have to respond to this blatant attempt on the part of Plaintiff to involve the Court in this ludicrous exercise, Defendants have had to expend time and incur additional attorney's fees to respond to this frivolous and baseless motion. Pursuant to Rule 37, Federal Rules of Civil Procedure, Plaintiff should be sanctioned by the Court in an appropriate amount to not only compensate Defendants for the expenses attendant to having to respond to Plaintiff's frivolous motion but also in an amount sufficient to punish Plaintiff for his attempted abuse of the discovery process.

VI.

In additional support for the imposition of sanctions upon Plaintiff, Defendants would also bring to the Court's attention to the Certificate of Conference which is attached to Plaintiff's Motion to Compel and/or for Sanctions. Such Certificate of Conference made to the Court by counsel for Plaintiff declares that on September 13, 1991, counsel spoke to Carlyle Chapman counsel for Defendant Allstate regarding the merits of Plaintiff's motion. Plaintiff represented to the Court in his certificate of counsel that counsel for Allstate opposed his Motion. Such certification made by counsel for Plaintiff is false and was known to be false at the time made. In truth and in fact, counsel for Allstate stated to counsel for Plaintiff that he would contact his client to determine whether the continuing efforts to locate the underwriting file had been successful. No statement was made by such counsel opposing Plaintiff's Motion and counsel for Plaintiff's certification that such opposition was voiced is completely false.

VII.

The harassing tactics of Plaintiff are violative of the standards of litigation conduct adopted by the judges of the district, sitting en

banc, as set forth in Dondi Properties Corp. v. Commerce Savings and Loan Assn., 121 F.R.D. 284 (N.D. Tex. 1988). It is requested that this Court take action to curb the tactics of Plaintiff as illustrated by his Motion to Compel and/or for Sanctions.

CONCLUSION

It is requested that Plaintiff's Motion to Compel and/or Sanctions be denied in its entirety and that Defendants recover their costs of having to respond to said frivolous Motion that sanctions be issued against counsel for Plaintiff and Plaintiff for the abusive tactics employed herein.

Respectfully submitted,
CHAPMAN & REESE
A Professional Corporation

s/Carlyle Chapman
Carlyle H. Chapman, Jr.
State Bar No. 04134500
Charles S. Black, Jr.
State Bar No. 02381500
Attorney for Defendants
1200 Stemmons Place
2777 Stemmons Freeway
Dallas, TX 75207
214/638-3600
FAX: 214/638-6640

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing instrument has this 19th day of September, 1991, bee mailed to Timothy T. Mitchell, Esq., Rashti and Mitchell, 7727 Willow Vine Court, Suite 129, Dallas, TX 75230.

s/Carlyle Chapman
Carlyle H. Chapman, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
METROPOLITAN LIFE	§	S-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Cheryl Oaks, a person known to me, and after being duly sworn did upon her oath depose and state as follows:

"My name is Cheryl Oaks and I am over the age of twenty-one (21) years and am fully competent and capable of stating the matters set forth hereinafter; which matters are based on my personal knowledge.

I am employed by Metropolitan Life Insurance Company("MetLife") as a claim supervisor. In my position with MetLife, I am in charge of the entire claim file and all other files and documents maintained by MetLife regarding that certain benefit plan under which Herman Mitchell, Plaintiff in the instant cause, makes claim. The benefit plan in operation was issued to Marathon Group by Allstate Life Insurance Company ("Allstate") and was administered by MetLife. After the subject benefit plan was issued by Allstate, but before the claims made by Plaintiff herein were filed, Allstate transferred its entire book of business regarding employee benefit plan (as defined under the Employee Retirement Income Security Act of

1974 ["ERISA") , 29 U.S.C. 51001, et. seq.) to MetLife; including that certain employee benefit plan under which Plaintiff makes claim in the instant cause.

Under the transfer of Allstate's employee benefit plan business to MetLife, Allstate transferred certain of its files and documents regarding said employee benefit plans, including such files and documents maintained by its sales, servicing, claims and underwriting units, where ever located. MetLife, therefore, took over the operation of Allstate's entire business, as relates to employee benefit plans. Further, certain of the employees of Allstate were hired by MetLife and became MetLife employees.

I have been in charge of and responsible for the maintenance of such books, records, files and documents transferred, from Allstate to MetLife as relates to and concerning the employee benefit plan made the subject of the instant cause and which relates to sales, underwriting, servicing and claims. No files or documents exist regarding the sales, underwriting, service and claims made under the employee benefit plan under which Plaintiff makes claim in the instant cause, other than those files and documents over which I maintain custody and control.

Previously, I have been requested to undertake a search of the files and documents under my custody and control in order to respond to Plaintiff's Request for Production in the instant cause. Upon completion of the search I undertook, certain documents were identified, located and produced to Plaintiff, as were responsive to Plaintiff's request for production. Such documents, to the extent responsive, were produced to Plaintiff by "Defendant's Response to Plaintiff's Request for Production", previously filed in this instant cause. Thereafter, in response to "Plaintiff's Second Request for Production to Allstate Life Insurance Company", I was requested to make a further search for documents; specifically documents

received from Allstate which relate to the marketing of that certain employee benefit plan under which Plaintiff makes claim, and formulation of the definition of "Total Disability" contained within such employee benefit plan. No additional documents or files were found which related to the matters about which inquiry was made in Plaintiff's Second Request for Production to Allstate.

On March 28, 1991, I appeared for oral deposition in this cause, at the insistence of Plaintiff, and advised Plaintiff's counsel, Timothy Mitchell, that upon further search of the books, records, documents and files transferred to MetLife by Allstate that there are no further documents or files which are responsive to Plaintiff's requests for documents regarding the employee benefit plan in question.

Further, on March 28, 1991, I advised Plaintiff's counsel that no documents exist which concern formulation and interpretation of the definition of "Total Disability" contained in the subject employee benefit plan."

Further, Affiant sayeth not.

s/Cheryl Oakes
Cheryl Oaks

SUBSCRIBED AND SWORN TO BEFORE ME on this 17th day of September, 1991, to certify which, witness my hand and official seal.

s/Rebekah J. Varney
Notary Public - State of ~~Texas~~ Illinois

My Commission Expires:
7-2-95

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed -Clerk-US District Court,
Eastern District of Texas
March 25, 2004
By: David Maland, Clerk

HERMAN E. MITCHELL	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	3:94-CV-1562-R
ALLSTATE LIFE INSURANCE	§	
COMPANY,	§	
Defendant.	§	

AFFIDAVIT OF CARLYLE H. CHAPMAN, JR.

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, personally appeared Carlyle H. Chapman, Jr., personally known to me, and upon his oath did depose and say as follows:

My name is Carlyle H. Chapman, Jr., I am an attorney duly licensed to practice law in the State of Texas, by the Texas Supreme Court, and my license is in good standing. I am admitted to practice before the United States District Court, including the United States District Court for the Northern District of Texas. I am counsel of record for Allstate Life Insurance Company, Defendant in the instant cause. I am fully competent to state the matters set forth hereinafter, and the matters set forth are based on personal knowledge.

Exhibits "1" and "2" are true and correct copies of correspondence prepared by me and forwarded to Timothy T.

Mitchell, counsel for Plaintiff Herman E. Mitchell, in the captioned cause.

Exhibits "3" and "4" are true and correct copies of excerpts from the deposition transcript taken in Cause No. S-90-125-CA, Herman E. Mitchell v. Metropolitan Life Insurance Company and Allstate Insurance Company, Northbrook, Illinois, before the United States District Court, Eastern District of Texas, Sherman Division, and the Affidavit of Cheryl Oaks filed in said cause, respectively.

Further, Affiant Sayeth Not."

s/Carlyle Chapman
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 27th day of January 1995, to certify which witness my hand and seal of office.

s/Tracy D. Moore
Notary Public - State of Texas

My Commission Expires:
May 9, 1998 Seal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HERMAN E. MITCHELL, Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
METROPOLITAN LIFE	§	S-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared Cheryl Oaks, a person known to me, and after being duly sworn did upon her oath depose and state as follows:

"My name is Cheryl Oaks and I am over the age of twenty-one (21) years and am fully competent and capable of stating the matters set forth hereinafter; which matters are based on my personal knowledge.

I am employed by Metropolitan Life Insurance Company("MetLife") as a claim supervisor. In my position with MetLife, I am in charge of the entire claim file and all other files and documents maintained by MetLife regarding that certain benefit plan under which Herman Mitchell, Plaintiff in the instant cause, makes claim. The benefit plan in operation was issued to Marathon Group by Allstate Life Insurance Company ("Allstate") and was administered by MetLife. After the subject benefit plan was issued by Allstate, but before the claims made by Plaintiff herein were filed, Allstate transferred its entire book of business regarding employee benefit plan (as defined under the Employee Retirement Income Security Act of

1974 ["ERISA") , 29 U.S.C. 51001, et. seq.) to MetLife; including that certain employee benefit plan under which Plaintiff makes claim in the instant cause.

Under the transfer of Allstate's employee benefit plan business to MetLife, Allstate transferred certain of its files and documents regarding said employee benefit plans, including such files and documents maintained by its sales, servicing, claims and underwriting units, where ever located. MetLife, therefore, took over the operation of Allstate's entire business, as relates to employee benefit plans. Further, certain of the employees of Allstate were hired by MetLife and became MetLife employees.

I have been in charge of and responsible for the maintenance of such books, records, files and documents transferred, from Allstate to MetLife as relates to and concerning the employee benefit plan made the subject of the instant cause and which relates to sales, underwriting, servicing and claims. No files or documents exist regarding the sales, underwriting, service and claims made under the employee benefit plan under which Plaintiff makes claim in the instant cause, other than those files and documents over which I maintain custody and control.

Previously, I have been requested to undertake a search of the files and documents under my custody and control in order to respond to Plaintiff's Request for Production in the instant cause. Upon completion of the search I undertook, certain documents were identified, located and produced to Plaintiff, as were responsive to Plaintiff's request for production. Such documents, to the extent responsive, were produced to Plaintiff by "Defendant's Response to Plaintiff's Request for Production", previously filed in this instant cause. Thereafter, in response to "Plaintiff's Second Request for Production to Allstate Life Insurance Company", I was requested to make a further search for documents; specifically documents

received from Allstate which relate to the marketing of that certain employee benefit plan under which Plaintiff makes claim, and formulation of the definition of "Total Disability" contained within such employee benefit plan. No additional documents or files were found which related to the matters about which inquiry was made in Plaintiff's Second Request for Production to Allstate.

On March 28, 1991, I appeared for oral deposition in this cause, at the insistence of Plaintiff, and advised Plaintiff's counsel, Timothy Mitchell, that upon further search of the books, records, documents and files transferred to MetLife by Allstate that there are no further documents or files which are responsive to Plaintiff's requests for documents regarding the employee benefit plan in question.

Further, on March 28, 1991, I advised Plaintiff's counsel that no documents exist which concern formulation and interpretation of the definition of "Total Disability" contained in the subject employee benefit plan."

Further, Affiant sayeth not.

s/Cheryl Oakes
Cheryl Oaks

SUBSCRIBED AND SWORN TO BEFORE ME on this 17th day of September, 1991, to certify which, witness my hand and official seal.

s/Rebekah J. Varney
Notary Public - State of ~~Texas~~ Illinois

My Commission Expires:
7-2-95

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from Cheryl Oakes' March 28,1991 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by the ERISA plan administrator Cheryl Oakes' of Metropolitan Life Insurance Company, objections by attorney Paul Huck):

Page 5 lines 17 through 21
[By Attorney Huck]

> Let me make one quick one as to be subpoena duces tecum. The defendants have already produced the entire claim file, it's my understanding also the entire underwriting file relating to the policy in this action

Page 6 lines 18 through 24
[By attorney Timothy Mitchell]

> Plaintiff would, for the record, say in response to the objection just made, in our conversations before we went on the record here, Metropolitan Life stated that they had produced us all of the underwriting files. In fact, we do not believe that we have been provided with this....

Page 11 lines 5 through 6
[Answer by witness Cheryl Oakes' of Metropolitan Life Insurance Company]

> I forwarded a file that was considered the underwriting file, the underwriting documents.

Page 11 lines 10 through 11
[Answer by witness Cheryl Oakes' of Metropolitan Life Insurance Company]

> I know there was coverage documents, as far as what was going to be the coverage,

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from Cheryl Oakes' March 28,1991 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by the ERISA plan administrator Cheryl Oakes' of Metropolitan Life Insurance Company, objections by attorney Paul Huck):

Page 11 lines 15 through 16
[Answer by witness Cheryl Oakes' of Metropolitan Life Insurance Company]

> I forwarded whatever I was able to get from the underwriting department.

Page 14 lines 2 through 5
[Answer by witness Cheryl Oakes' of Metropolitan Life Insurance Company]

> All I can tell you is anything that my attorneys asked for was forwarded, and as far as I can recall it was the underwriting file, the claim file and perhaps some referral guidelines.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from Allstate Life Insurance Company Representative March 28,1991 Deposition (objections by attorney Paul Huck)

Page 3 lines 7 through 12
[By attorney Paul Huck]

> All records of Allstate concerning this policy have been produced through Metropolitan, i.e., the Allstate underwriting file, which as part of the sale of Allstate Group Insurance assets has now become the property of Metropolitan.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from Laura Sullivan's February 10, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by Laura Sullivan of Metropolitan Life Insurance Company, objections by attorney Linda Moore):

Page 19 lines 5 through 15

[Question] Do you have an understanding as to what this document is?

[Answer] Yes.

[Question] What is it?

[Answer] This is a page from a coverage card that was used with Allstate.

[Question]: And what is a coverage card?

[Answer] A coverage card is a document that was completed by the underwriters which identified provisions of a specific group disability plan or other group disability coverage.

Page 21 lines 5 through 11

[Question] The page 69 that's on Sullivan exhibit 8 that has the policy number at the top 6440293[illegible] It has the definition of presumptive disability. Was it your earlier testimony that this page, page 69, was actually part of the coverage card for that policy?

[Answer] Yes.

Page 26 lines 1through 6

[Question] Looking at page 60, which I believe you have testified is the coverage card, would it be fair to assume that the coverage granted by the Herring Marathon, Inc. policy number 64402935 was own occupation coverage for Class I and II employees?

[Answer] Yes.

Filed -Clerk-US District Court Eastern District of Texas,
March 25, 2004 By: David Maland, Clerk

Deposition Excerpts from Laura Sullivan's February 10, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by Laura Sullivan of Metropolitan Life Insurance Company, objections by attorney Linda Moore):

Page 37 lines 17 through 24 and Page 38 lines 1 through 7

[Question] If you had a surgeon who is making a disability claim and he had an injury to his hand and he was governed by an own occupation coverage, and he had this presumptive disability enhancement and surgery–he only did surgery, let's say, one day out of five but he produced 60% of his income from that surgery and he just saw patients on the other days.

If his income-he had an injury to his hand that he could not do the surgery, but he still could carry on his office practice the other four days of the week, but his income was reduced by 60% and he had the provision-this presumptive disability provision on page 69, would that be a time where you would hypothetically apply the presumptive disability enhancement benefit and award him-award his claim?

Page 38 lines 11 through 22

[The Witness] What was his loss of earnings that you indicated please?

[Mr. Mitchell Question] 60%. Let's say he was making $200,000 a year and now he was only able to make $80,000 a year, because $120,000 of it was from surgery. Because of the injury to his hand he could not do the surgery anymore?

[Answer] If that individual was in fact working in some capacity and his earnings loss was a result of that injury, the presumptive disability provision would be applied; and if in fact his ability to earn or his earnings actually were less than 50% of his predisability earnings, then that work activity would not cause him to be deemed not disabled.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004, By: David Maland, Clerk

Deposition Excerpts from attorney Carlyle Chapman's January 26, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Carlyle Chapman, objections by attorney Linda Moore):

Page 18 lines 8 through 25 and Page 19 lines 1 through 11

[Question] I'm showing you what is marked Chapman's Exhibit 2 and Chapman's Exhibit 3. These are portions– Chapman's Exhibit 2 is a portion of the deposition transcript from Cheryl Oakes March 1991 deposition. And Chapman 3 is a portion of the deposition of the Allstate Insurance Company representative deposition. And if you refer to page–of Chapman Exhibit 2 on page 3, where the language is underlined and bolded, it says:

> "MR. HUCK: Let me make one quick one as to the subpoena duces tecum. The defendants have already produced the entire claim file, it's my understanding, also, the entire underwriting file relating to the policy in this action."

So at the March 1991 deposition, attorney Huck specifically stated that the underwriting file relating to the policy in this action had been produced; is that correct?

[Answer] Is it correct that that's what he said?

[Question] Yes, is it correct that that's what he said?

[Answer] Apparently so. I wasn't there, but I can read the transcript, just as you can.

[Question] But you had read the transcript before you prepared the response to the motion for– strike that. You had read the deposition transcript before you prepared the response to our motion to compel in September of 1991. You already testified to that.

[Answer] That's correct.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from attorney Carlyle Chapman's January 26, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Carlyle Chapman, objections by attorney Linda Moore):

Page 41 lines 5 through 17

[Question] Explain a little bit in the Sherman suit your dealings with Paul Huck. Was it on a daily basis, a weekly basis, what type of basis was it?

[Answer] For as needed.

[Question] Did you and Paul Huck ever discuss the underwriting file?

[Objection] I'm going to object to that as attempting to evade the attorney-client privilege.

[Question] I'm not asking for what they said. I'm just asking if he ever talked to them about it. He can either answer "yes" or "no".

[Objection] That, you can answer.

[Answer] Yes.

Page 41 lines 24 through 25 and Page 42 lines 1 through 4

[Question] Again, just answer this "yes" or "no". Before September 19, 1991—that was when you filed the response to our motion to compel---did you have any discussions with Paul Huck concerning the underwriting file?

[Answer] Yes.

Page 47 lines 16 through 19

[Question] Where did you get the documents that you produced to me in the Sherman suit? Who gave those to you?

[Answer] They came from Paul Huck.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004 By: David Maland, Clerk

Deposition Excerpts from attorney Carlyle Chapman's January 26, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Carlyle Chapman, objections by attorney Linda Moore):

Page 49 lines 11 through 21

[Question] But Mr. Huck, on the record, stated that the underwriting file had been produced, didn't he?

[Answer] That's what he said.

[Question] And we stated on the record that we didn't think we had been provided with the underwriting file; is that correct?

[Answer] That's what the record seems to reflect.

[Question] And Ms. Oakes testified that she sent the underwriting file to her attorneys, which today we found out that's attorney Huck; is that correct?

[Answer] I think that's right.

Page 60 lines 13 through 25 and Page 61 lines 1 through 4

[Question] Do you know what this document is?

[Answer] Well, it says that it's a partial transcript of the Sherman trial from December 1992.

[Question] Can you refer to page 7 and page 8? I believe it's your quote, the language that's highlighted. It says "Mr. Chapman" starting at line 17 through 20 and then 24 to 25 and then line 1 on the next page, does it say: "Mr. Chapman: Your Honor, we object to this document and the tender of this document for the reason that, one, it is outside the scope of review that the Court is undertaking in this matter. Further, nothing with regard to the proposal was before the administrator at the time the decision was made, and it's clearly outside the ambit of the Court's inquiry here"?

Do you see that?

[Answer] Yes.

Deposition Excerpts from attorney Carlyle Chapman's January 26, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Carlyle Chapman): Page 61 lines 5 through 25 and Page 62 lines 1 through 13

[Question] Is that an objection that you made to the introduction of the Allstate Life Insurance Company group long-term disability proposal designed specifically for the Herring Marathon Group, Inc., document that was attempted to be offered into evidence at the Sherman trial?

[Answer] Well, I can't tell from the record, but if you tell me that that's what exhibit number 23 was--

[Question] Yes, I will represent that to you.

[Answer] --I can't respond. If that's what it was, then that was the objection that I made, in part, to Exhibit 23.

[Question] Now, in fact, this same proposal, a copy of it--except for the hand written language on some of the pages that we just went through, a copy of this document was sitting in your office in Dallas in the underwriting file when you made this objection; isn't that true?

[Answer] I don't know what that has to do with the objection.

[Question] It didn't have anything to do--I'm just asking you. When you made that objection--my question is: Was a copy of the proposal with the handwritten notes that was a little bit different, was that sitting in your office in Dallas?

[Answer] It was in the underwriting file, and the underwriting file was in my possession.

[Question] In Dallas?

[Answer] Well, I don't know about that. I don't know.

[Question] Well, was it--was it with you in Sherman at the trial?

[Answer] I don't recall.

[Question] Could it have been with you at the trial?

[Answer] Anything's possible. You take everything you can to trial.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from attorney Paul Huck's February 10, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Paul Huck, objections by attorney Linda Moore):

Page 20 lines 14 through 16

[Question] Would you have discussed this with Carl Chapman?
[Answer] Yes, I would have.

Page 65 lines 21 through 25 and Page 66 lines 1 through 4

[Question] During 1990 when the documents were produced to the plaintiff in the underlying Sherman lawsuit, who was it that actually produced the documents?
[Answer] Local counsel, Carlyle Chapman.
[Question] Where did Carlyle Chapman get those documents from?
[Answer] He got them from me.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from attorney Paul Huck's February 10, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Paul Huck, objections by attorney Linda Moore):

Page 86 lines 23 through 25 and Page 87 lines 1 through 25 and Page 88 lines 1 through 2

[Question] In 1990 when--was it you that made the initial decision that everything that was in the underwriting file was not going to be produced?

[Objection] I will object to the form.

[Answer] It's certainly something that I would have been a part of that decision.

[Question] Did you ever specifically go through each and every page of the underwriting file and see if certain pages may or may not have been responsive to other requests or subpoenas duces tecum or other requests for documents?

[Answer] I do not remember.

[Question] Would it have been your normal practice to go through each and every page and make that decision?

[Answer] It would have been my normal practice to go through the whole file, correct.

[Question] Who had ultimate authority as to whether or not a document was produced or not produced?

[Answer] Ultimate authority in a normal course, it will be my decision. I of course could have been --if I discussed it with my superiors at the time, I could of course be overruled, but I don't remember.

Filed -Clerk-US District Court
Eastern District of Texas,
March 25, 2004
By: David Maland, Clerk

Deposition Excerpts from attorney Paul Huck's February 10, 2004 Deposition (questions by Mitchell's attorney Mr. Timothy Mitchell, answers by attorney Paul Huck, objections by attorney Linda Moore):

Page 88 lines 21 through 25

[Question] Did you and Carl Chapman make joint decisions as to which documents were produced and which were not produced?

[Answer] It would certainly be a decision we were both comfortable with.

Page 105 lines 8 through 24

[Question] Let's look at your– because I believe that–refer to Huck Exhibit number 3 page 3, lines 7 through 12. Can you read that please?

[Answer] "All records of Allstate concerning this policy have been produced through Metropolitan, i.e., the Allstate underwriting file, which as part of the sale of Allstate Group Insurance assets, has now become the property of Metropolitan."

[Question] So in Huck Exhibit number 3, on March 28, 1991 you specifically stated at that time that the Allstate underwriting file concerning the policy had been produced; is that correct?

[Answer] That is what it says.

[Question] In fact this was not true; was it?

[Answer] No it was not.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 25, 2004

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	Cause No.
METROPOLITAN LIFE	§	CAS-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AFFIDAVIT OF LOUIS A. SHIRLEY, M.D.

STATE OF TEXAS X

COUNTY OF DALLAS X

BEFORE ME, the undersigned authority, on this day personally appeared Louis A. Shirley, M.D. who is personally known to me, and first being duly sworn according to law, upon his oath deposed and said:

"My name is Louis A. Shirley, I am over 18 years of age, of sound mind and fully competent to make this Affidavit. I have personal knowledge of each of the facts stated therein, and they are all true and correct.

1. I am a medical doctor practicing in the area of Dallas County.

2. My education consists of a medical degree from the University of Mississippi.

3. Additional training, including formal courses, that I have, include an internship at Wilford Hall Hospital and a residency at Fitzsimons Army Hospital.

4. Special licenses that I have include board certification in

ophthalmology.

5. Professional associations that I belong to include the American Medical Association and the Texas Medical Association.

6. Experience in practicing medicine that I have includes practicing medicine in the Air Force from 1959-1976 and in private practice from 1976 to present.

7. I have practiced medicine for 30 years.

8. In practicing medicine I treated and/or examined over 50,000 patients.

9. I have examined Herman E. Mitchell for injury to his eyes. The content of the examinations is included in various documentation that make up my file on this patient. The opinions contained in this Affidavit are based on my examination of Herman E. Mitchell and my file on Herman E. Mitchell and the assumptions contained in item 10 below.

10. Assuming: (a) a definition of disability as follows: "Total disability or totally disabled means the employee is completely and continuously unable to do each of the material duties of his job; and requires the regular care and attendance of a Physician"; and, (b) the material duties of an employee's job are: (I) reading detailed financial records; (ii) reading detailed business documentation; (iii) performing those primary functions and responsibilities described in exhibit "A" attached hereto and incorporated herein by reference the same as if fully copied and set forth at length; (iv) performing secondary responsibilities (to those set forth in exhibit "A"); (v) performing specific elements to each general descriptions set forth in exhibit "A"; (vi) included performing duties that required visual concentration, including but not limited to reading, reviewing and comprehending complex sales and acquisition documentation relating to commercial real estate transactions, I have the following opinion set forth in items 11 and 12 below.

11. Based on the above and in full support of Dr. Dwain G. Fuller's evaluation and diagnosis of the niacin maculopathy, in my opinion Herman E. Mitchell has suffered permanent damages to his eyes. Supporting the forgoing in layman's terms, the niacin that Herman E. Mitchell used caused blisters on the inside of Herman E.

Mitchell's eyeballs, and when these blisters healed permanent scar tissue remained on the inside of Herman E. Mitchell's eyeballs, thereby causing certain symptoms that Herman E. Mitchell now suffers from.

12. Based on the definition of disability contained in item 10 above and the material employee duties contained in item 10 above, in my opinion Herman E. Mitchell is disabled from doing each of the material duties set forth in item 10 above. It is not my opinion that Herman E. Mitchell is disabled from performing the material duties of any occupation, but it is my opinion that Herman E. Mitchell is disabled from his own occupation as set forth in this affidavit.

/s/ Louis A. Shirley, M.D.

SUBSCRIBED AND SWORN TO BEFORE ME this 18 day of March, 1991.

My Commission Expires:
10-14-93

/s/ Jacqueline Renee Pinkston
Notary Public in and for the
State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District of Texas
March 25, 2004

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
v.	§	
	§	Cause No.
METROPOLITAN LIFE	§	CAS-90-125-CA
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AFFIDAVIT OF KELLER P. GREENFIELD, M.D.

STATE OF TEXAS X

COUNTY OF DALLAS X

BEFORE ME, the undersigned authority, on this day personally appeared Keller P. Greenfield, M.D. who is personally known to me, and first being duly sworn according to law, upon his oath deposed and said:

"My name is Keller P. Greenfield, I am over 18 years of age, of sound mind and fully competent to make this Affidavit. I have personal knowledge of each of the facts stated therein, and they are all true and correct.

1. I am a medical doctor practicing in the area of preventive medicine.

2. My education consists of Bachelor of Science degree from Baylor University, and an M.D. (medical doctor's) degree from Baylor Medical College.

3. Additional training, including formal courses, that I have, include one year general rotating internship at Hermann Hospital in Houston, Texas.

4. Professional associations that I belong to include the American Medical Association, the Texas Medical Association, and the Dallas County Medical Society.

5. Experience in practicing medicine that I have includes 23 years in general and family practice and 14 years in preventive medicine.

7. I have practiced medicine for 37 years.

8. In practicing medicine I treated and/or examined approximately 10,000 to 20,000 patients.

9. I have examined Herman E. Mitchell for injury to his eyes. The content of the examinations is included in various documentation that make up my file on this patient. My file is further supplemented by that certain letter dated March 4, 1991, a copy of which is attached hereto as Exhibit "B" and incorporated herein as if fully set forth at length. The opinions contained in this Affidavit are based on my examination of Herman E. Mitchell and my file on Herman E. Mitchell and the assumptions contained in item 10 below.

10. Assuming: (a) a definition of disability as follows: "Total disability or totally disabled means the employee is completely and continuously unable to do each of the material duties of his job; and requires the regular care and attendance of a Physician"; and, (b) the material duties of an employee's job are: (I) reading detailed financial records; (ii) reading detailed business documentation; (iii) performing those primary functions and responsibilities described in exhibit "A" attached hereto and incorporated herein by reference the same as if fully copied and set forth at length; (iv) performing secondary responsibilities (to those set forth in exhibit "A"); (v) performing specific elements to each general descriptions set forth in exhibit "A"; (vi) included performing duties that required visual concentration, including but not limited to reading, reviewing and comprehending complex sales and acquisition documentation relating to commercial real estate transactions, I have the following opinion set forth in items 11 and 12 below.

11. Based on Dr. Dwain G. Fuller's report, a copy of which is in my file, it is my opinion that Herman E. Mitchell has suffered

permanent damage to his eyes. Supporting the forgoing opinion in layman's terms, the niacin that Herman E. Mitchell used caused blisters on the inside of Herman E. Mitchell's eyeballs, and when these blisters healed permanent scar tissue remained on the inside of Herman E. Mitchell's eyeballs, thereby causing certain symptoms that Herman E. Mitchell now suffers from.

12. Based on the definition of disability contained in item 10 above and the material employee duties contained in item 10 above, in my opinion Herman E. Mitchell is disabled from doing each of the material duties set forth in item 10 above. It is not my opinion that Herman E. Mitchell is disabled from performing the material duties of any occupation, but it is my opinion that Herman E. Mitchell is disabled from his own occupation as forth in this affidavit.

/s/ Keller P. Greenfield, M.D.

SUBSCRIBED AND SWORN TO BEFORE ME this 15 day of March, 1991.

My Commission Expires:
02-22-94

/s/ J. Seamster
Notary Public in and for
the State of Texas

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

Filed U.S. District Court
Eastern District Of Texas
March 25, 2004

HERMAN E. MITCHELL,	§	
Plaintiff,	§	
	§	
v.	§	
	§	(Original Civil Action
METROPOLITAN LIFE	§	No. S-90-125-ca)
INSURANCE COMPANY and	§	
ALLSTATE LIFE COMPANY,	§	Cause No. 4:01CV30
NORTHBROOK, ILLINOIS	§	
Defendants.	§	

AFFIDAVIT OF HERMAN E. MITCHELL
DATED MARCH 17, 2004

STATE OF TEXAS X
COUNTY OF DALLAS X

BEFORE ME, the undersigned authority, on this day personally appeared Herman E. Mitchell, who is personally known to me, and first being duly sworn according to law, upon his oath deposed said:

"My name is Herman E. Mitchell, I am over 18 years of age, of sound mind and fully competent to make this Affidavit. I have personal knowledge of each of the facts stated therein, and they are all true and correct.

[Sections 1-8 Omitted].

9. I at all material times met the requirements of the presumptive disability provision and would have been granted benefits under the presumptive disability provision. My pre-disability 'Basic Monthly Earnings' were $11,416.67 per month. Fifty percent of my pre-disability 'Basic Monthly Earnings' was $5,708.34 per month (or the threshold of the presumptive disability provision).

During 1989 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1989 my other earned income amounted to $707.96 per month. During 1990 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1990 my other earned income amounted to $633.50 per month. During 1991 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1991 my other earned income amounted to $121.67 per month. During 1992 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1992 my other earned income amounted to zero per month. During 1993 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1993 my other earned income amounted to zero per month. During 1994 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1994 my other earned income amounted to zero per month. During 1995 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1995 my other earned income amounted to $1,465.83 per month. During 1996 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1996 my other earned income amounted to $3,345.67 per month. During 1997 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1997 my other earned income amounted to $2,940.58 per month. During 1998 my 'Basic Monthly Earnings' were zero per month (which was less than the threshold of the presumptive disability provision) and during 1998 my other earned income amounted to $4,806.33 per month. During 1999 my 'Basic Monthly Earnings' were $1,600.00 per month (which was less than the threshold of the presumptive disability provision) and during 1999 my other earned income amounted to $2,348.83 per month. During 2000 my 'Basic Monthly Earnings' were $5,342.32 per month

(which was less than the threshold of the presumptive disability provision) and during 2000 my other earned income amounted to $0 per month. During 2001 my 'Basic Monthly Earnings' were $3,239.67 per month (which was less than the threshold of the presumptive disability provision) and during 2001 my other earned income amounted to $0 per month. During 2002 my 'Basic Monthly Earnings' were $3,824.17 per month (which was less than the threshold of the presumptive disability provision) and during 2002 my other earned income amounted to $0 per month.

[Section 10 Omitted].

11. The injury to my eyesight affected my job performance and the decline in my job performance since the injury to my eyesight was why I was not offered a position with the new company after the buyout of the old company in July of 1989.

[Section 12 Omitted].

13. My loss of earnings on and after June 29, 1989 through March 17, 2004 was caused by the injury and resulting symptoms to my eyes and eyesight, and I will continue to lose earnings after the date hereof.

14. I worked or sought work at all times after June 29, 1989 through March 17, 2004, and I will continue to work after the date hereof. I earned or attempted to earn income at all times after June 29, 1989 through March 17, 2004, and I will continue to earn or attempt to earn income after the date hereof. I was seeking employment as of July 1, 1989 and my income did not drop to zero.

[Sections 15 and 16 Omitted].

Further Affiant sayeth not."

STATE OF TEXAS X
COUNTY OF DALLAS X

BEFORE ME, the undersigned authority, on this day personally appeared Herman E. Mitchell who is personally known to me, and first being duly sworn according to law, upon his oath deposed and said:

"My name is Herman E. Mitchell. I am over 18 years of age, of sound mind and fully competent to make this Affidavit. I have personal knowledge of each of the facts contained therein, and they are all true and correct."

s/Herman E. Mitchell
Herman E. Mitchell

SUBSCRIBED AND SWORN TO BEFORE ME this 17th day of March, 2004

s/Aaron Hilburn

My Commission Expires Notary Public in and for the State of Texas
10-17-2004
Seal

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* BOARD CERTIFIED IN COMMERCIAL REAL ESTATE LAW

United States Court
of Appeals Fifth Circuit
FILED
April 4, 2005
Charles R. Fulbruge, III
Clerk

April 1, 2005

Via Federal Express Tracking # 8473-0545-3391
Mr Charles R. Fulbruge, III, Clerk
United States Court of Appeals for the Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: Case No. 04-40756; United States Court of Appeals for the Fifth Circuit; Mitchell, Appellant v. Metropolitan Life, Appellee; USDC# 4:01-CV-30-PNB

Dear Mr. Fulbruge:

I am attorney for Appellant Herman E. Mitchell. The referenced case was set for oral argument on April 7, 2005 in the East Court room before Justices Jones, Garza, and Reavley. I was advised this morning that the case remains on the calendar but there will now be no oral argument. I am enclosing seven copies of this letter and request that you provide the following case citation to the Justices for consideration as the following case was relied on by the District Court and is relied on in Appellees brief, but at oral argument I was going to argue it for a different purpose:

> *Browning v. Navaro,* 826 F. 2d 335, 344 (5th Cir. 1987) ("Indeed, *Hazel Atlas* might be read to suggest

> that once the determination is made that officers of the court have corruptly abused the judicial process, the court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the court may rely on such conduct alone to set aside the judgment.")

Please file the original of this letter and return an extra file stamped copy to me in the enclosed self-addressed, stamped envelope. Thank you.

Very truly yours,

s/Timothy T. Mitchell
Timothy T. Mitchell

cc. Linda Moore, Esq. Via fax and U.S. Mail